(18,912.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 269.

THE HELENA WATER WORKS COMPANY, APPELLANT,

vs.

THE CITY OF HELENA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF HELENA, Appellant,
vs.
THE HELENA WATER WORKS COMPANY, Appellee. } No. 891.

Transcript of Record.

Appeal from the circuit court of the United States for the district of Montana.

1 In the United States Circuit Court, Ninth Circuit, District of Montana.

HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant.

Caption.

Be it remembered that the complainant filed its bill of complaint herein on the 12th day of April, 1901, which said bill of complaint is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant.

Bill of Complaint.

To the honorable the judges of the circuit court of the United States, ninth circuit, district of Montana:

2 The Helena Water Works Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and a resident and citizen of said State, brings this its bill against The City of Helena, a municipal corporation, organized and existing under and by virtue of the laws of the State of Montana, and a resident and citizen of said State, and for cause of complaint against said defendant, your orator complains and says:

1. That it is now and has been for more than two years last past a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and a resident and citizen of said State.

2. That the defendant, The City of Helena, is now and was at all the times herein mentioned a municipal corporation duly organized and existing under and by virtue of the laws of the Territory and State of Montana, and a resident and citizen of said State.

3. That the matter in dispute in this suit exceeds in value the sum of $2000, exclusive of interest and costs.

4. That your orator is the owner and in possession of real and personal property situate in the city of Helena of the value of several hundred thousand dollars, upon which taxes have been levied, assessed and collected by said city for several years last past, and is a taxpayer in said city.

5. Your orator further shows that heretofore and in the month of January, 1890, the city council of the defendant The City of Helena, duly passed, adopted, and published as by law required ordinance No. 248, entitled, "To provide the city of Helena, and its in-
3 habitants with a permanent water supply," which said ordinance was approved by the mayor of said city on the 15th day of January, 1890. A true copy of said ordinance is hereto attached, marked Exhibit "A," and prayed to be taken and considered as a part hereof the same as though set forth herein *in hæc verba*.

6. That George F. Woolston, whose name appears in said ordinance, was at the time of the passage and approval thereof and at all other times during the years 1889 and 1890 a citizen and resident of the State of New York.

7. That within thirty days after the passage of said ordinance No. 248 the Helena Consolidated Water Company, a corporation, mentioned therein, fully complied with all and singular the provisions and requirements of section 25 of said ordinance, by filing with the clerk of the city of Helena an acceptance in writing for itself, its successors and assigns, of all and singular the terms, conditions, and provisions of said ordinance, a bond in the penal sum of $50,000, with two sufficient sureties, conditioned as required by said section, which was approved by the mayor of said city, and also the relinquishment mentioned in said section, which was accepted by said city.

8. Your orator further shows that said Helena Consolidated Water Company fully complied with all of the terms, conditions, and provisions of said ordinance and the contract therein contained and resulting from the acceptance of said ordinance, on its part to be kept and performed, until on or about the 16th day of March,
4 1897, on which day a receiver was appointed and took possession of all of the property of said company as hereinafter more fully alleged.

9. That in complying with the terms, conditions, and provisions of said ordinance and contract the said Helena Consolidated Water Company expended a large amount of money, aggregating several hundred thousand dollars in acquiring a water supply, and a system through and by which to furnish water to said city and its inhabitants, as by said ordinance required, which said system and supply

was accepted by said defendant as complying with the requirements of said ordinance No. 248.

10. And your orator further shows that heretofore and on or about the 16th day of March, 1897, in a suit then pending in the circuit court of the United States, ninth circuit, district of Montana, in which the said Helena Consolidated Water Company was defendant, an order was made and entered appointing one James H. Mills receiver of all and singular the property, rights, privileges, and franchises of the said Helena Consolidated Water Company, a defendant in said suit, and authorizing the said receiver to take possession and assume the management and control of the water plant and system of said company, through which said company had theretofore been and was then furnishing water to said city of Helena, and its inhabitants, as aforesaid, and continue to furnish water in compliance with the terms and provisions of said ordinance No. 248, and the contract embraced therein, and carry on and conduct the
5 business of said company. That the said James H. Mills duly qualified as such receiver by giving and furnishing a bond in a penal sum fixed by said court, conditioned for the faithful discharge of the duties of his office as such receiver, which bond was duly approved and filed with the clerk of said court, and by taking and subscribing an oath to the effect that he would faithfully discharge the duties of his office as receiver and obey the orders of the court, which said oath was filed with the clerk of said court. That thereupon the said receiver took possession of all and singular the property, rights, privileges, and franchises of the said Helena Consolidated Water Company, assumed the management and control of said water plant and system of said company, and thereafter and until his discharge as hereinafter alleged furnished water to the said city of Helena, and its inhabitants through the said plant and system, and fully complied with each and all of the terms, conditions and provisions of said ordinance No. 248, and the contract therein contained on the part of the said Helena Consolidated Water Company, its successors and assigns, to be kept and performed.

11. That thereafter in said suit so commenced as aforesaid a decree was duly and regularly passed and entered directing and authorizing a sale of all and singular said property of the Helena Consolidated Water Company, including all of the rights, privileges and franchises granted by said ordinance No. 248, and the contracts embraced therein, and then owned and possessed by said water
6 company, and appointing, authorizing and empowering Henry N. Blake, as master commissioner, to make said sale. That the said Henry N. Blake, master commissioner, duly advertised and offered for sale all and singular said property in accordance with said decree, and the same was thereupon and on the 14th day of February, 1898, duly sold to the grantors of your orator, Charles S. Tuckerman, a resident and citizen of the State of Massachusetts, and Benjamin Graham, a resident and citizen of the State of New York, as trustees; that a report of said sale was made to and said sale was

duly confirmed by said court. That the said Charles S. Tuckerman and Benjamin Graham, trustees, made, executed, acknowledged, and delivered to your orator a conveyance of all and singular said property purchased by them as aforesaid, and your orator is now and has been since said conveyance the owner of said water plant, supply and system, and property, including all rights, franchises and privileges granted and conferred by said ordinance No. 248, and the contract contained therein. That thereafter and on the 1st day of April, 1899, pursuant to an order of the said circuit court of the United States, ninth circuit, district of Montana, made and entered in said suit referred to, the said James H. Mills was discharged as receiver, and authorized and directed to transfer and deliver over to your orator said water supply, plant and system, and all rights, privileges and franchises conferred by said ordinance No. 248, and the contract therein contained. The said transfer and delivery was thereupon made, and since said date, to wit, April 1st, 1899,
7 your orator has been the owner and in the full and complete possession and control of said water supply, plant, and system, and of all rights, privileges, and franchises conferred by said ordinance and said contract existing by virtue of the acceptance thereof.

12. And your orator further shows that ever since the first day of April, 1899, it has furnished water to said city and permitted said city to use the hydrants connected with and constituting a part of said water plant and system, and has fully complied with each and all of the terms, provisions and conditions of said ordinance No. 248, and the contract therein contained on the part of the said Helena Consolidated Water Company, its successors and assigns, to be kept and performed.

13. And your orator further shows that it and its predecessors in interest have for more than ten years last past furnished water to the said city and the inhabitants thereof through the said water plant and system owned and controlled by it as aforesaid, and the said defendant, The City of Helena, has accepted and used said water during all of said time. That the water plant and system of your orator is the only water plant and system in the said city of Helena.

14. Your orator further shows that in the month of December, 1899, the city council of the said defendant City of Helena, duly passed and adopted ordinance No. 467, entitled: "An ordinance relating to the procurement of a water system and supply for the city of Helena which shall own and control said water system and supply, and devote the revenues derived therefrom to the pay-
8 ment of the debt incurred therefor, and providing for the submission to the taxpayers affected thereby of the question of extending the limit of indebtedness of said city over and above the three per cent. limit provided by section 6 of article XIII of the constitution of the State of Montana for the purpose of securing such water system and supply," which said ordinance was approved by the mayor of said city on the 4th day of December, 1899. That a

true copy of said ordinance is hereto attached, marked Exhibit "B," and prayed to be taken and considered as a part hereof, the same, as though set forth herein *in hæc verba*.

15. That notice of an election was given and published for the time and in the manner provided in said ordinance, judges of election were appointed by the mayor of said city, and said election was held on the 18th day of January, 1900, as by said ordinance required, and a majority of the voters who voted at said election voted "Yes," and in favor of the proposition of extending the limit of indebtedness of said city to procure a water system and supply, as determined by the city council of said city upon canvassing said votes.

16. Your orator further shows that the assessed value of the taxable property of the city of Helena as determined by the assessment for State and county taxes for the year 1899 was the sum of $12,287,510, and the assessed value of said property as determined by the assessment for State and county taxes for the year 1900 was the sum of $9.864,525.

17. That thereafter and in the month of December, 1900,
9 the said city council of said defendant, The City of Helena, duly passed and adopted ordinance No. 483, entitled: "Amending ordinance No. 482, authorizing the taking of all the water and water rights of McClellan creek, and those water rights of Prickly Pear creek, comprising the waters of said McClellan creek, for the purpose of procuring a water supply for the city of Helena, Montana, which shall own and control the same, and authorizing the commencement of condemnation proceedings for such purpose," which said ordinance was approved by the mayor of said city on the third day of December, 1900. A true copy of said ordinance is hereto attached, marked Exhibit "C," and prayed to be taken and considered as a part hereof, the same as though set forth herein *and hæc verba*.

18. Your orator further shows that at a meeting of the city council of said defendant, The City of Helena, held on the third day of April, 1901, a preamble and resolution was passed and adopted by said city council, and approved by the mayor of said city, a copy of which is hereto attached, marked Exhibit "D," and prayed to be taken and considered as a part hereof the same as though set forth herein *in hæc verba*.

19. That pursuant to said resolution the mayor and city clerk of said city issued and signed warrants on the treasurer of said city, amounting in the aggregate to the sum of $30,000, in payment for the water rights and property mentioned and described in said preamble and resolution, which said warrants were delivered to the
10 several parties named in said preamble and resolution, and by them presented to the city treasurer of said city, and paid out of funds and moneys in the treasury of said city derived from taxes levied and collected by said city for general municipal and administrative purposes, whereby $30,000 of the funds and money of said city was misappropriated and misapplied. That the deeds mentioned and referred to in the said preamble and resolution were

at the time of the delivery of said warrants delivered to and accepted by said defendant, The City of Helena.

20. And your orator further shows that the said defendant, The City of Helena, pursuant to said ordinance No 483, has commenced an action in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, against certain of the owners and claimants of the right to the use of the waters of McClellan creek, a stream of water situate in Jefferson county, Montana, for the purpose of acquiring by the exercise of the right of eminent domain the right to the use of 350 inches of the waters of said McClellan creek to supply the said city of Helena and its inhabitants with water, which said action is now pending and undetermined.

21. That heretofore in the month of January, 1895, the defendant, City of Helena, commenced an action or proceeding in the district court of the first judicial district, of the State of Montana, in and for the county of Lewis and Clarke, against the said Helena Consolidated Water Company, to obtain the issuance by said court of a writ of mandamus, requiring and commanding the said
11 company to furnish water to said city for fire, sewerage, and other municipal purposes; that in said action or proceeding it was finally adjudged and determined that the said Helena Consolidated Water Company was in duty bound and obligated to furnish water to said city for such purposes, by virtue of having received the franchise granted by, and having accepted the terms, conditions and provisions of said ordinance No. 248, and a final judgment was rendered and entered by said court therein directing and ordering a peremptory writ of mandamus to issue, commanding and requiring the said company to furnish water to said city for such purposes; that no appeal has ever been taken from said judgment, and the same is now and has been at all times since its rendition in full force and effect.

22. And your orator further shows that the indebtedness of the defendant, The City of Helena, is now and has been for several years last past in excess of three per cent. of the assessed value of all the taxable property in said city as determined by the assessment for State and county taxes during each and all of said years; that said indebtedness is now and has been for several years last past in excess of the sum of $516,000, and the value of the taxable property in said city during all of said time as determined by the assessment for State and county taxes, for each of said years, does not and has not exceeded the sum of $13,000,000.

23. And your orator further shows that no election has ever been held by the said defendant, The City of Helena, at which either the question of issuing bonds or contracting an indebtedness for
12 a water plant, water system, or water supply, to be owned and controlled by said city has been submitted to the qualified electors of said city.

24. And your orator further shows that the said defendant, The City of Helena, has never given your orator notice that it desires to

purchase the plant, franchise, or water supply of your orator, and no effort has ever been made by said defendant, The City of Helena, to agree with your orator upon the terms of such a purchase, or acquire the supply and plant of your orator.

25. And your orator further shows that said defendant, The City of Helena, claims and pretends to have authority to issue bonds and contract an indebtedness for a water supply and system to be owned and controlled by said city, and the revenues from which shall be devoted to the payment of the indebtedness incurred therefor, and that said defendant, The City of Helena, threatens to and will, as your orator is informed, verily believes and alleges, issue said bonds and contract such indebtedness unless restrained and enjoined from so doing by this honorable court.

26. And your orator further shows that it is the intention of the defendant, The City of Helena, to acquire a supply of water in addition to the supply it has already acquired by the purchase of the right to the use of the waters of Beaver creek, as aforesaid, and also a water plant and system in the said city of Helena, for the purpose of supplying said city and the inhabitants thereof with water, and threatens to and will, as your orator is informed, verily believes and alleges, acquire such supply
13 and system and engage in the business of furnishing said city and its inhabitants with water, unless enjoined and restrained from so doing by this honorable court.

27. And your orator further shows and alleges that the said ordinances numbered respectively 467 and 483, and the preamble and resolution adopted and approved as aforesaid, impair the obligation of the contract between your orator and said city resulting from the passage, approval and acceptance of said ordinance No. 248, in violation of section 11, article III of the constitution of the State of Montana, and section 10, article I of the Constitution of the United States.

28. And your orator further shows that if said defendant The City of Helena is not enjoined and restrained from carrying out its design and purpose of acquiring a water plant and system and supply of water and in engaging to furnish water to said city and its inhabitants, the franchise granted by said ordinance No. 248, and all rights and privileges conferred thereby and the contract contained therein will be greatly depreciated in value, and the property of your orator, consisting of said water plant and system, franchise and contract, will be confiscated and taken without just compensation being first paid therefor, in violation of section 14 of article III of the constitution of the State of Montana.

29. And your orator further shows that if the said defendant The City of Helena is not enjoined and restrained from carrying out its design and purpose of acquiring a water plant and system
14 and supply, and from engaging in furnishing the said city and its inhabitants with water, it will, as your orator is informed, verily believes and alleges, acquire such plant, system, and supply and engage in said business, thereby taking the property of

your orator, consisting of the franchise granted by said ordinance No. 248, the rights and privileges conferred thereby, the contract contained therein, and the water plant, system and supply of your orator, without due process of law, and in violation of the fourteenth amendment to the Constitution of the United States.

30. Your orator further shows that if said defendant is not enjoined and restrained from acquiring such plant and supply, and engaging in said business of furnishing said city of Helena and its inhabitants with water, it will, as your orator is informed and verily believes and so alleges, acquire such plant and supply and engage in such business, and that a large amount of taxes will be levied and assessed against the property of your orator, and collected from your orator, with which to pay the indebtedness which will be incurred in procuring such system and supply, whereby your orator will be compelled to contribute to the destruction of its business and property.

31. And your orator further shows that if said city acquires such water plant and system and engages in the business of furnishing water to said city and its inhabitants, the same will result in great and irreparable injury and damage to your orator both as a taxpayer in said city and as the owner and holder of the rights,
15 privileges and franchises granted by said ordinance No. 248, the contract contained therein, and the said water supply, plant and system.

32. That your orator has no plain, speedy, or adequate remedy in the ordinary course of the law.

In consideration whereof, and forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief prayed, and may make full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of its remembrance, knowledge, information, and belief, full, true, direct and perfect answers make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being expressly waived;

Your orator, to the end that it may obtain the relief to which it is justly entitled in the premises, prays the court to grant to it your writ of subpœna directed to the said def-ndant, The City of Helena, requiring it to appear herein and answer to the several allegations in this bill contained.

That your honors grant unto your orator your writ of injunction commanding the said defendant and each and all of its officers, agents, servants, and employees, to absolutely desist and refrain from erecting, constructing, purchasing, or otherwise acquiring, a water plant and system, and from acquiring a water supply, to be owned and controlled by said city for the purpose of furnishing said city and its inhabitants, or any thereof, with water, except the water plant, system, and supply of your orator, and from engaging
16 in the business of furnishing said city and its inhabitants, or any thereof, with water, except in the event it acquires the

plant, system and supply of your orator; and from incurring any indebtedness or expending any money therefor; and until such time as your honors shall direct and appoint a hearing herein.

That said defendant, its officers, agents, servants, and employees, and each of them, be restrained from the commission of any of the acts or doings herein sought to be enjoined, and that upon such hearing the writ herein prayed for pending this suit be made and confirmed until the final determination of this suit, and that thereupon said injunction be made perpetual.

And that your orator may have such other and further relief, preliminary and final, as to the court may seem meet and proper, and which equity may require, and for costs.

CLAYBERG & GUNN,
Solicitors and of Counsel for Complainant.

UNITED STATES OF AMERICA,
District of Montana, State of Montana, } *ss:*
County of Lewis and Clarke,

William A. Chessman, being duly sworn on his oath, deposes and says: That he is the agent of The Helena Water Works Company, the complainant in the foregoing bill of complaint, and makes this affidavit for and in behalf of said complainant; that he has read said bill of complaint and knows the contents thereof,
17 and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

WM. A. CHESSMAN.

Subscribed and sworn to before me this 12th day of April, 1901.

JNO. K. SCOTT,
Notary Public, Lewis and Clarke County, State of Montana.

EXHIBIT "A."

Ordinance No. 248.

To provide the city of Helena and its inhabitants with a permanent water supply.

Whereas, the city council of the city of Helena did advertise in the "Helena Herald," the "Helena Journal," and the "Helena Independent," for a period of forty days, to wit, from the 13th day of June, 1899, to the 1st day of August, 1899, with specifications, for proposals for a water supply for the use of said city and the inhabitants thereof; and,

Whereas, it was found and determined upon an examination of the several proposals received in response to such advertisement,

and after due consideration thereof, that George F. Woolston was the lowest responsible bidder therefor; and,

Whereas, the Helena Consolidated Water Company is the assignee and successor of the said George F. Woolston; and,

18 Whereas, the city council of the said city of Helena has awarded the said contract to the said Helena Consolidated Water Company as such assignee and successor.

Now, therefore, be it ordained by the city council of the city of Helena:

SECTION 1. There is hereby granted to the Helena Consolidated Water Company, and its successors and assigns, for the full term of twenty years from the passage hereof, the license and franchise of laying and maintaining water mains and pipes in and through all of the streets, alleys, avenues and public grounds of the city of Helena for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies or corporations within the said city desiring to purchase the same, and to said city for fire, sewerage and other purposes, in case said city desires to purchase the same, subject, however, to the provisions of this ordinance hereinafter contained, establishing maximum rates, and generally to have and exercise all the rights, privileges, and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city if required; provided, however, that nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Company, or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys, and public grounds, of said city with water mains and pipes, or the exclusive right of conveying,

19 distributing or selling the same throughout the said city, or of furnishing the same to said city, except as hereinafter set forth.

SEC. 2. For the purpose of laying, repairing, keeping, and maintaining such water mains and pipes there is hereby granted to said Helena Consolidated Water Company, and to its successors and assigns, the right and privilege of digging ditches and making excavations in and upon any and all streets, avenues, alleys, public grounds, and thoroughfares of the city; provided, that it or they shall, without unreasonable delay, restore the same to as good condition as they were before the said excavations were made, and remove all earth, sand, rubbish and other material.

SEC. 3. All pipes and mains including service pipes connected therewith, shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location in streets; and all repairs and extensions of such pipes and mains shall be done under the supervision of said street commissioner as to grade and location in streets. Nothing contained herein shall preclude said City of Helena from regrading or changing the grade of any street or streets within said city, or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting

giving or granting any franchises, rights or easements to any person or persons, corporation or corporations, whomsoever, so long as such franchises, rights and easements do not interfere with the fran-
20 chises, rights and easements hereby granted. And that said Helena Consolidated Water Company must and shall look solely and exclusively to the person or persons, corporation or corporations, to whom such franchises, rights, and easements have been given by said city for any and all damages the said Helena Consolidated Water Company may sustain by reason of any interference with any of its pipes, mains or hydrants, or any exposure of the same caused by such person or persons, corporation or corporations.

SEC. 4. The works hereby contemplated shall be so constructed and maintained as to interfere as little as possible with the property of others; and any damage resulting from said erection, construction and operation thereof shall be repaired and paid for by the said Helena Consolidated Water Company, or its successors or assigns.

SEC. 5. It is hereby provided that in no case shall the mains and pipes be laid and maintained under the provisions of *this in any manner* interfere with any mains or pipes legally laid in said streets so as to injure or obstruct the use thereof; nor shall such pipes or mains interfere or obstruct any sewer now in said streets, nor shall there be any interference with mains, pipes or sewers which may be hereafter authorized to be laid or constructed by or under the authority of said City of Helena by mains hereafter laid by the said Helena Consolidated Water Company or its successors or assigns, and at all places and points in the said city where said mains and pipes approach gas mains or pipes there shall be at least six inches of earth between the same.

21 SEC. 6. The said Helena Consolidated Water Company shall furnish and provide a full ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction) and for other purposes; and such supply shall be full, ample and sufficient for the present population of said city, and for the future population of the said city as the same may be from time to time during the full term of five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use.

SEC. 7. The pressure in pipes and mains at the level of the first floor of the courthouse of Lewis and Clarke county, in said city, and at all other points of equal height, shall be maintained at not less than sixty pounds to the square inch if reservoir works shall be used; and if the direct pressure system shall be used, sixty pounds to the square inch fire pressure, and forty pounds to the square inch ordinary pressure shall be maintained at said points and all other points of equal height.

SEC. 8. The said Helena Consolidated Water Company shall lay

or provide at its own cost and expense twenty miles of mains within the limits of said city, exclusive of the amount of mains connecting the works of said company with the point or points of distribution, and such mains shall be of the following sizes and on the following streets in the said city of Helena, respectively: At least ten
22 inches in inner diameter on Lawrence street from Benton avenue to Main street; on Rodney street from Broadway to Helena avenue; on Main street from Bridge street to Helena avenue; on Helena avenue from Main street to the right of way of the Northern Pacific Railroad Company; on Broadway from Main street to Rodney street; at least eight inches in inner diameter on Madison avenue from Lawrence street to Davis street; in the Hauser addition; on Lawrence from Madison avenue to Benton avenue; on Rodney street from Bridge street to Broadway; on Fifth avenue *to* Warren street to Hoback street; on Ninth avenue from Rodney street to Idaho avenue; at least five inches in inner diameter on Benton avenue from Edwards to Lyndale avenue; on Clore street from Bridge street to Benton avenue at Flowerree street; on Lawrence street from Madison avenue to the western boundary of city; on Clarke street from Strawberry street to Clore street; on Howie street from Adams street to Clarke street; on Jefferson street from Adams to Ming street; on Ming street from Jefferson street to Howie street; on Bridge street from Clore street to Chaucer street; on West Main street from Bridge street south 1,050 feet; on Rodney street from Bridge street south 1,250 feet; on Wood street from Main street to Ewing street; on Ewing street from Fifth avenue to Helena avenue; on Jackson street from Wood street to Sixth avenue; on Sixth avenue from Jackson street to Main street; on Broadway from Rodney street to Beattie street; on Fifth avenue from Hoback street to Teitjen street; on Gallatin street from Helena avenue to Fifth avenue; on Lyndale avenue from Benton avenue to Helena avenue;
23 on Third street, Northern Pacific addition, from Helena avenue north 500 feet; on Grand street from Jackson street to Warren street; on Warren street from Broadway to Helena avenue; on Hemlock street from Madison avenue to Harrison avenue; on Chaucer street from Bridge street to Broadway; at least four inches in inner diameter, on Dearborn street from Lawrence street to Davis street in Hauser addition; on Cutler street from West Main to Rodney street; on Pine street from Joliet street to Rodney street; on Water street from Cutler street south 430 feet; on Breckenridge street to Beattie street; on Eighth avenue, from Eighth avenue to Hoback street; on Eleventh avenue from Rodney street to Hoback street; on Hoback street from Eleventh to Pflaume street; at least three inches in inner diameter on Davis street in Hauser addition from Madison avenue to Benton avenue; on Strawberry street from Clarke street to Lawrence; on Adams from Howie street to Jefferson street; on Davis street from Broadway to Fifth avenue; on Hoback street from Fifth avenue to Eleventh avenue.

In making up the said twenty miles of mains, the said Helena

Consolidated Water Company may put in and shall be allowed for any pipes or mains now laid in any of the streets of the city of Helena, and owned by the said water company, not counting, however, more than one main or pipe upon the same portion of any street, and in addition to such mains and pipes as are now laid, and which may be used under the provisions of this ordinance, the said Helena Consolidated Water Company shall lay such other mains, of such sizes, on such other streets as may be ordered by the said city council of the said city so as to make its full complement of mains within said city twenty miles.

SEC. 9. The said Helena Consolidated Water Company shall place down and connect with the twenty miles of mains herein provided for, at points to be designated by the city council, or a committee thereof, two hundred hydrants, and shall maintain said hydrants during the continuance of this contract. Said hydrants shall have double nozzles and shall be nonfreezing and of the latest and most improved pattern, and all connections of such hydrants with the mains shall be of not less than four inches in diameter. Provided, that if the contractor use any system of pipes and hydrants now in said city and formerly belonging to the Helena Water Company, such hydrants need not be changed or renewed, and said council shall not change or relocate the same, but said hydrants shall be considered as having been located by the said city council or committee thereof under the provisions of this ordinance. The location of mains and hydrants to complete the twenty miles of mains, and the two hundred hydrants provided for in this ordinance, shall be made by the city council when the said water company is ready to erect the same without delay or loss to the said water company.

SEC. 10. The said Helena Consolidated Water Company shall lay and maintain, in addition to the twenty miles of mains hereinbefore specified, such mains, of such sizes, at such times, and upon such streets as the city council shall from time to time direct, which said work shall be commenced and prosecuted to completion with diligence and without unreasonable delay, and shall place and maintain one hydrant for each one-tenth of a mile on such additional mains, if the same shall be of the diameter of six inches or more, or if the same shall be of the diameter of less than six inches, then one hydrant for each one-seventh of a mile, said hydrants to be of the pattern above specified; no hydrant to be placed on any pipe of less than four inches in diameter.

SEC. 11. All water which may be required by said city of Helena for the use of any and all buildings owned and occupied by said city for municipal purposes, and also all water necessary for street sprinkling purposes, in said city, shall be furnished by the said Helena Consolidated Water Company without cost or charge to said city; provided, however, that in case the said city shall hereafter desire to use any water for street sprinkling purposes, the same must be taken from the mains of the said Helena Consolidated Water Company by means of stand-pipes erected at the cost and expense of said city, at such point or points as may be necessary upon the

lines and mains of said company, and that said city shall not have the right to use any of the hydrants of the said company for the purpose of obtaining water for street sprinkling purposes.

SEC. 12. In case of unavoidable accident or breakage of machinery, due time shall be given to the said Helena Consolidated Water Company to repair the damages, but it shall receive no pay from any person or corporation for any time during which it fails to furnish water for the causes in this section stated.

26 SEC. 13. The works hereinbefore provided for, and the water system connected therewith, shall be completed and in readiness for the conveyance and distribution of water throughout the twenty miles of mains hereinbefore provided for, on or before the 1st day of July, 1890.

SEC. 14. The mayor and any committee of said council of said city, or any officer or person authorized by said council, shall at all times have free access to the entire works and system of the said Helena Consolidated Water Company, for the purpose of inspecting and examining, or testing the same, or any part or portion thereof.

SEC. 15. Said Helena Consolidated Water Company shall, from and after the 20th day of January, 1890, until said system is completed, in accordance with the terms of this contract, furnish the said city of Helena with water for fire, sewerage and other purposes, through the hydrants included in the contract between the said City of Helena and the Helena Water Company and the hydrants on such extensions as have been or may be ordered by the city council of said city, at the price herein provided for; but it shall not be required to complete its system for the conveyance and distribution of water through the twenty miles of mains herein provided for, before the first day of July, 1890.

SEC. 16. The charges for water furnished by the said Helena Consolidated Water Company to any persons, bodies or corporations in this city shall not exceed the following rates: For private houses, $1 per month; for each private bathtub, 33 cents per month; for each private wash-basin, 25 cents per month; for each pri-

27 vate water-closet 33 cents per month; for each private urinal, 33 cents per month. For irrigating lawns, gardens and grounds, where other water is taken, $1.25 per month, for each fifty feet fronting on the street; where no other water is taken, $1.50 per month. When revolving fountains and sprinklers are used, an extra price may be charged, which shall not exceed twenty-five per cent. in addition to the rate for irrigation above prescribed; provided, however, there shall not be more than one nozzle or sprinkler used for each fifty feet of frontage, at the rate specified in this section. All charges for irrigation shall be limited to the months of May, June, July, August, September and October. And in case any person or persons, corporation or corporations, or company, shall use water for irrigation purposes at any other time than during the months herein mentioned, such person or persons, corporation or corporations, or company, shall pay to the said contractor, or its successors or assigns, for the use of such water for the time so used,

upon the same terms per month as above stated. Where meters are used, the charge shall not exceed the following rates, viz: For 1,000 gallons per day or less, 4 cents per 100 gallons; for 1,000 to 4,000 gallons per day, 3 cents per 100 gallons; for 4,000 gallons per day or more, 2 cents per 100 gallons. When said water company believes that water is being wasted or unnecessarily used, it may place a meter on the service pipe communicating with the said premises, but if it is found that such consumer is not using over 33 per cent. more water than the monthly rate would pay for, according to the meter rates herein prescribed, the said water company shall
28 only be allowed to collect the monthly rate herein provided. If the said consumer is using over 33 per cent. more than the monthly rate would pay for, then the said water company may collect meter rates as herein specified.

SEC. 17. The said Helena Consolidated Water Company shall make no charge for tapping mains for the connection of service pipes therewith, except the actual cost of labor and materials required, and in no case to exceed two dollars and fifty cents for four inch mains, three dollars for six inch mains, three dollars and fifty cents for eight inch mains, four dollars for ten inch mains, and four dollars and fifty cents for twelve inch mains. Such connection shall be made at the cost of the applicant by any plumber whom he may employ, but not, however, until such applicant shall have procured a permit for such connection from the said Helena Consolidated Water Company; provided, always, that said company shall not refuse to permit connections to be made by or to sell or deliver water to any persons who shall offer to pay for the same and shall comply with the provisions of this ordinance, and with such regulations as may be from time to time prescribed by the city council of said city, and the reasonable rules and regulations of said company.

SEC. 18. The said Helena Consolidated Water Company shall have the right to put in a stop-cock on each service pipe, below the sidewalk near the curb, at its own proper cost and expense, and shall box the same securely and place the cover flush with the sidewalk, and may turn off the water from any premises when the
29 water rates are not paid within fifteen days after the same shall have become due, and when said consumer has failed to comply with any reasonable rule or regulation of said company, but the said company shall not place any self-closing faucet or water-bib upon any service pipe without the consent of the owner thereof.

SEC. 19. No person or persons, excepting the mayor and fire marshal, or those acting under their authority, or the authority of the said city council, and the agents and employees of the said water company, shall meddle with or use any of the hydrants provided for in this ordinance, and any person violating this provision shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not less than five dollars nor more than fifty dollars. Said hydrants shall only be used for fire and sewerage purposes.

SEC. 20. From and after the 20th day of January, 1890, the said

Helena Consolidated Water Company shall keep and maintain in the storage reservoir formerly belonging to the Helena Water Company and commonly known as the Woolston reservoir, or in the reservoir formerly belonging to Helena Water Company, and commonly known as the Hale reservoir, a depth of not less than six feet of water, and after the first day of July, 1890, shall keep and maintain in both of said reservoirs a depth of not less than six feet of water.

SECTION 21. There is hereby appropriated out of the yearly revenues of the said city of Helena, for the use and benefit of the said Helena Consolidated Water Company, its successors and assigns, during the full term of five years from and after the 20th day of January, 1890, the following sums of money, to wit: Out of
30 the general fund of said city the sum of twenty dollars per years for each hydrant required by this ordinance to be kept and maintained by the said Helena Consolidated Water Company, on the twenty miles of mains provided for in this ordinance, and for the use of the water through said hydrants by said city for the purpose of sewerage, and the sum of sixteen dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purposes. Out of the fire department fund of said city the sum of eighty dollars per year for each hydrant required by this ordinance to be kept and maintained by said Helena Consolidated Water Company, on the said twenty miles of mains provided for in this ordinance, and for the use of the water through said hydrants by said city for the purpose of extinguishing fires and for the fire department; and the sum of fifty-eight dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purpose. And it is hereby made the duty of said city council, during the said term of five years, to levy annual taxes under the provisions of the charter of said city authorizing the levy of taxes for general purposes and for fire department purposes sufficient in amount to provide funds to meet the appropriations hereby made. For the purpose of carrying out the provisions of this section, the mayor and city clerk are hereby authorized upon allowance by the city council to draw warrants on the above funds for the above amounts and to pay the same unto the said Helena Consolidated Water Company, its successors or assigns, at the end of each month; provided, however, that if the
31 said company shall fail to comply with the requirements herein contained concerning the pressure and depth of water in the reservoirs to be maintained, it shall forfeit all claims for payment for the month during which such failure occurs; and if such failure shall continue for more than three days after written notice by the city, then the said company shall pay a further forfeit of five hundred dollars per day which said forfeit shall be paid before said company shall receive any further payment from said city in pursuance of the provisions of this ordinance. This provision, however, shall not apply to cases where the failure occurs through accidents, as provided in this ordinance.

SEC. 22. In the use of water under this ordinance for the purpose of flushing sewers said Helena Consolidated Water Company shall furnish water for such number of flushing tanks as said city council may from time to time require, but said flushing tanks shall be so set and regulated that the same will dump or discharge themselves but twice in every twenty-four hours.

SEC. 23. Nothing contained in this ordinance shall in any manner interfere with or curtail the rights of the said Helena Consolidated Water Company to prosecute any action, or maintain any claim it may have against any person or persons, corporation or corporations, which shall break, injure or destroy any hydrants or other property belonging to said company, including such damage or compensation as said company may be entitled to by reason of the loss or want of water occasioned by such break, injury or destruction of the said hydrants.

32 SEC. 24. Said Helena Consolidated Water Company, or its successors or assigns, may have the right, and they are hereby given the privilege of making such reasonable rules and regulations as may be necessary for the purpose of carrying on the business of furnishing water under the provisions of this ordinance and for the purpose of making personal examination of the premises of an applicant for water, and of designating rates as herein established, and for the purpose of acquiring the right of access at all reasonable hours to all premises supplied with water for the purpose of designating the rates and ascertaining whether or not such customer is wasting the water within the meaning of this ordinance; all of which rules and regulations shall be such as are authorized by law, and shall be binding upon the persons or corporations connecting with the works of said company or taking water from the mains of said company.

SEC. 25. Within thirty days after the passage of this ordinance the said Helena Consolidated Water Company shall file with the clerk of said city an acceptance in writing for itself and for its successors and assigns, of all the terms, conditions and provisions of this ordinance, and a bond in the penal sum of $50,000, with two or more sufficient sureties to be approved by the mayor, conditioned that if the said company shall receive the sums of money herein agreed to be paid to it for the term of two years, upon its compliance with the conditions herein set forth, it will indemnify and save harmless the said city from any and all damages, costs, expenses, or liability therefor of whatsoever character, and to whomso-

33 ever the same may be due, or become created by, or in any manner arising from ordinance No. 93, approved November 22, 1886, or ordinance No. 95, approved February 13th, 1887. And this ordinance shall have no force or effect whatever except upon the filing of said acceptance and bond as herein provided; and also a relinquishment by George F. Woolston and the Helena Water Company of Salem Ohio, from all claims against said city to the date of this contract arising from the ordinance in the section mentioned.

SEC. 26. It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed.

Approved January 15th, 1890.

EXHIBIT "B."

Ordinance No. 467.

An ordinance relating to the procurement of a water system and supply for the city of Helena, which shall own and control said water system and supply and devote the revenues derived therefrom to the payment of the debt incurred therefor, and providing for the submission to the taxpayers affected thereby of the question of
34 extending the limit of indebtedness of said city over and above the three per cent. limit provided by section 6 of article XIII of the constitution of the State of Montana, for the purpose of securing such water system and supply.

Be it ordained by the city council of the city of Helena:

SECTION 1. That it is desirable for the city of Helena to procure a water system and supply for said city which shall own and control said water system and supply and devote the revenues derived therefrom to the payment of the debt incurred therefor.

SEC. 2. That the total assessed valuation of the taxable property of said city as ascertained by the last assessment for State and county taxes is the sum of twelve million two hundred and eighty-seven thousand five hundred and ten dollars ($12,287,510); that the present existing indebtedness equals at least three per cent. of the total assessed valuation of the taxable property of said city as ascertained by the last assessment for State and county taxes; that it is necessary to extend the limit of indebtedness mentioned in section 6 of article XIII of the constitution of the State of Montana in order to procure a water system and supply for said city.

SEC. 3. That the question of extending such limit of indebtedness to five per centum over and above the three per cent. fixed by section 6 of article XIII of the constitution of the State of Montana, as provided by subdivision 64 of section 4800 of the Political Code and amendments thereof for the purpose of procuring a water system and supply for said city which shall own and control said water system and supply and devote the revenues derived therefrom
35 to the payment of the debt incurred therefor, be submitted to a vote of the taxpayers affected thereby at a special election to be held on the 18th day of January, 1900.

SEC. 4. That the city clerk be and he is hereby authorized and directed to publish notice of such election in some newspaper published in the city, and post such notice in not less than three public places in said city, such publication and posting to be for a period of not less than three weeks prior to such election, such notice shall be in the following form:

Notice of Election.

To the taxpayers of the city of Helena, Montana, affected by an extension of the limit of indebtedness of said city to five per centum (5%) over and above the three per cent. (provided by section 6 of article XIII of the constitution of the State of Montana) of the total assessed valuation of the taxable property of said city of Helena as ascertained by the last assessment for State and county taxes:

Notice is hereby given that a special election of the taxpayers will be held on the 18th day of January, A. D. 1900, from eight o'clock a. m. to six o'clock p. m. for the purpose of submitting to the taxpayers of said city qualified to vote thereon the question whether or not pursuant to the provisions of section 6 of article XIII of the constitution of the State of Montana and the acts of the Legislative Assembly in pursuance thereof and applicable thereto, the limit of the indebtedness of said city of Helena shall be extended to
36 five per centum over and above the three per cent. (provided by section 6 of article XIII of the constitution of the State of Montana), of the total assessed valuation of the taxable property of said city as ascertained by the last assessment for State and county taxes for the purpose of procuring a water supply and system for said city which shall own and control said water supply and system, and devote the revenues derived therefrom to the payment of the debt incurred therefor.

That the places for holding such election in said city will be as follows:

First ward: 112 State street.
Second ward: 13 North Jackson street, Ming's opera house.
Third ward: 24 Park avenue, Israel block.
Fourth ward: Auditorium.
Fifth ward: Hose house, 550 Spruce street.
Sixth ward: Fire station.
Seventh ward: Fire station.
By order of the city council.
Dated November 8th, 1899.

EDWARD HORSKY, *City Clerk.*

SEC. 5. That the time, place and purpose of holding such election shall be as specified in said notice, and the ballots to be used at such election shall be of ordinary paper, four by four inches in size, and of the following form:

37 *City Water Plant.*

Extension of the limit of indebtedness of the city of Helena, Montana, to five (5) per centum over and above the three per cent. fixed by section 6 of article XIII of the constitution of the State of Montana of the assessed valuation of the taxable property of said city as ascertained by the last assessment for State and county taxes, for the purpose of procuring a water system and supply for said city which shall own and control said water system and supply and devote the revenues derived therefrom to the payment of the debt incurred therefor.

Extension of the limit of indebtedness to procure a water system and supply, "Yes."

Extension of limit of indebtedness to procure a water system and supply, "No."

The voter must make a cross "X" opposite the answer he intends to vote for.

SECTION 6. That the city (clerk) be and he is hereby authorized and directed to take all necessary steps and proceedings and do all things required by law for the holding of such election.

SECTION 7. All ordinances and parts of ordinances in conflict with any of the provisions hereof are hereby repealed.

Passed and approved this fourth day of December, 1899.

F. J. EDWARDS, *Mayor.*

Attest: EDWARD HORSKY, *City Clerk.*

38 EXHIBIT "C."

Ordinance No. 483.

Amending ordinance No. 482, authorizing the taking of all the water and water rights of McClellan creek and those water rights of Prickley Pear creek comprising the waters of said McClellan creek, for the purpose of procuring a water supply for the city of Helena, Montana, which shall own and control the same, and authorizing the commencement of condemnation proceedings for such purpose.

Be it ordained by the city council of the city of Helena:

SECTION 1. That ordinance No. 482 of the city of Helena, Montana, passed and approved the 20th day of September, A. D. 1900, be amended to read as follows, to wit:

SEC. 2. Whereas, the city of Helena, Montana, has not now and never has had a water supply or water system of its own, and whereas, by an affirmative vote of the majority of the taxpayers of the city of Helena, Montana, at an election duly held on the 18th day of January, 1900, it was duly voted to extend the constitutional limit of said city five per centum over and above the three per cent.

limit fixed by section 6 of article XIII of the constitution of the State of Montana for the purpose of procuring a water supply and system for said city which shall own and control said water supply and system, and devote the revenues derived therefrom to the payment of the debt incurred therefor, and thereafter, to wit, on
39 the 4th day of June, 1900, by ordinance No. 477 of the said city duly passed and approved in accordance therewith, said limit of indebtedness was duly declared extended as aforesaid; and whereas, the city council thereafter duly advertised for and received bids for a water supply, and for a water supply and system; as aforesaid, and among others was that of John B. Sanford, as trustee, for what is known as the Turner water right or Crystal Creek ditch comprising the waters of Crystal creek, Lost creek and Jackson creek, all tributaries of said McClellan creek in the county of Jefferson, in the State of Montana, but that the amount of said bid for the water therein mentioned is too high, and the amount of water thereby covered is not in itself a sufficient quantity, and there being no other bids for said water supply, and all bids whatsoever for water for said purposes having been rejected, and that it will be necessary to obtain the said water right and other waters in said McClellan creek and its tributaries; and whereas, it is desirable and advisable for the best business, sanitary and domestic interests of said city and its inhabitants that it should procure a good, pure, wholesome and abundant supply of water and a water system for said city which shall own and control the same and devote the revenues derived therefrom to the payment of the debt incurred therefor; and whereas, the said city council has carefully considered the various bids submitted as aforesaid, and in addition thereto has investigated many other sources of water to supply said city, and as the result thereof are of the opinion that all things considered the waters of said McClellan creek and its tributaries
40 will constitute the best water supply for said city, the quantity, quality, distance, price and all things considered.

SEC. 3. That of the water and water rights of said McClellan creek and its tributaries situate in Broadwater, Lewis and Clarke and Jefferson counties, State of Montana, and all those waters of Prickley Pear creek situate in Jefferson and Lewis and Clarke counties, State of Montana, comprising the waters of said McClellan creek, three hundred and fifty inches be condemned for the purpose of securing a water supply for said city of Helena which shall own and control the same and devote the revenues derived therefrom to the payment of the debt incurred therefor.

SEC. 4. That the city attorney is hereby authorized and instructed to institute such suit or other proceedings as may be necessary for the condemnation of said water and water rights for said purpose.

Passed and approved this 3d day of December, 1900.

F. J. EDWARDS, *Mayor.*

Attest: EDWARD HORSKY, *City Clerk,*
By ALDERMAN WENDEL.

EXHIBIT "D."

Whereas, it is the wish and desire of the taxpayers of the city of Helena, as expressed by their votes at an election duly called and held for that purpose, that the said city shall own, control, and operate its own water system and supply, with a view of supplying said city and its inhabitants with water for fire, sewerage, and domestic purposes; and

41 Whereas, in order that the wish of said taxpayers, so expressed, may be carried out and made possible, it is necessary that the city shall acquire and own a water supply; and

Whereas, an option has been obtained by the city for the purchase and ownership of sufficient of the waters of what is known as Beaver creek, in Broadwater county, Montana, in the quantity and for the considerations hereinafter stated; and

Whereas, the necessary surveys have been made, determining and demonstrating that such supply can be delivered by gravity at a point in the city higher than the Hale reservoir; and

Whereas, the following deeds have heretofore been duly executed, and are now on deposit in escrow for the quantity of water expressed in each as hereinafter set forth, to be delivered to the city of Helena upon payment of the amounts hereinafter specified, to wit: From Julia Reynolds and C. W. Reynolds, for 67 inches of water, consideration, $3,000; from George Beatty, for 67 inches of water, $4,500; from Andrew T. Thompson for his interest in 60 inches of water, $500; from Antone Semenec, for his interest in 60 inches of water, $2,500; from W. R. Davies, for 67 inches of water, $3,000; from Mrs. Amelia Falen for 67 inches of water, $3,000; from James S. Smith, for 1,000 inches of water known as French Bar and Indian Creek water rights, $10,000; from James S. Smith, for placer ground and bedrock water on Beaver creek, $3,500; making a total consideration or purchase price of $30,000; and

42 Whereas, it is the judgment of this council that the said water rights, privileges and property are of great value; that the consideration asked for the same is reasonable; that the same are available and desirous for the use of the city for the purposes hereinbefore stated; and that the best interests of the city and its inhabitants will be served by paying the said several sums amounting in the aggregate to $30,000 and taking up the aforesaid deeds, and

Whereas, there is now on hand in the treasury of the city a surplus of cash sufficient for the purpose of purchasing and acquiring the water, said water rights, privileges and property, over and above the amount necessary for general municipal and administrative purposes and for current expenses, without incurring any indebtedness in excess of the constitutional limit; and

Whereas, the payment of cash as herein contemplated, will save the city whatever interest might accrue on the bonds issued in payment of the aforesaid property; and

Whereas, the actual purchase of a water supply, and the actual payment therefor in cash, will determine beyond question that the city of Helena will, at the earliest possible date, own, control and operate an independent supply of pure and wholesome water with a pressure sufficient to justify insurance companies in making to the insured the lowest possible rates, and which will save the city from total destruction if a fire should get a fairly good start at some central point, which, owing to the notorious inadequacy and insufficiency of the present plant and supply, is not a possibility at this time.

43 Therefore be it resolved, by the city council of the city of Helena, That the said city of Helena do purchase and acquire the water rights, privileges and property aforesaid, as particularly set forth in said deeds so placed in escrow as aforesaid, at and for the consideration and prices aforesaid, and that the mayor and city attorney be and they are hereby authorized and empowered to issue and sign warrants of the city in the several amounts hereinbefore stated, amounting in the aggregate to the sum of $30,000, for the purpose of taking up said deeds so in escrow, and to pay over and use said warrants for that purpose, and take up and cause to be duly recorded, the said several deeds.

And to that end the said mayor and city attorney are hereby authorized to incur the expense necessary to carry out the authority hereby granted.

This resolution to take effect and be in force from and after its passage and approval.

Passed and approved this 3d day of April, 1901.

F. J. EDWARDS, *Mayor.*

Attest: EDWARD HORSKY, *City Clerk.*

(Endorsed:) Title of court and cause. Bill of complaint. Filed and entered April 12, 1901. Geo. W. Sproule, clerk.

44 And thereafter, to wit, on the 12th day of April, a subpœna in equity was duly issued, which said subpœna is entered of final record as follows:

Subpœna ad Respondendum.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana. In Equity.

The President of the United States of America to The City of Helena, defendant, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the courtroom in Helena,

on the 6th day of May, A. D., 1901, to answer a bill of complaint exhibited against you in said court by The Helena Water Works Company, complainant, who is a citizen of the State of New Jersey, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 12th day of April, in the year of our Lord one thousand nine hundred and one, and of our Independence the 125th.

[SEAL] GEO. W. SPROULE, *Clerk.*

45 *Memorandum Pursuant to Rule* 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit, on or before the first Monday of May next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

[SEAL.] GEO. W. SPROULE, *Clerk.*

CLAYBERG & GUNN,
Solicitors for Complainant, Helena, Montana.

Attest:
A true copy.
[SEAL.] GEO. W. SPROULE, *Clerk.*

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF MONTANA.

I hereby certify that I received the within writ on the 12th day of April, 1901, and personally served the same on the 12th day of April, 1901, on the City of Helena, by delivering to, and leaving with Frank J. Edwards, mayor of the city of Helena, for said defendant named therein personally, at Helena, in the county of Lewis and Clarke, in said district, a copy thereof.

Helena, April 12, 1901.

J. P. WOOLMAN,
United States Marshal,
By C. F. GAGE, *Deputy.*

46 (Endorsed:) No. 619. United States circuit court, ninth circuit, district of Montana. In equity. The Helena Water Works Company *vs.* The City of Helena. Subpœna. Filed April 12, 1901. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 13th day of May, 1901, a demurrer was filed herein, which said demurrer is entered of final record as follows, to wit:

In the United States Circuit Court, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. —.

Demurrer.

The demurrer of The City of Helena, the defendant above named, to the bill of complaint of The Helena Water Works Company, the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer shows unto this honorable court the following, viz.:

a. Said bill of complaint does not state facts sufficient to
47 entitle plaintiff to the relief demanded, or any other relief.

b. Said bill does not state facts sufficient to entitle plaintiff to the relief demanded, or any relief, either under the alleged contract or in the capacity of a taxpayer.

c. Said bill of complaint is altogether multifarious in that it appears thereby that the same is exhibited against the defendant upon two distinct and separate alleged causes of suit, and two separate and distinct matters, each complete within itself in this, to wit: A cause of suit upon the alleged contract, and a cause of suit in the capacity of taxpayer of said city of Helena.

d. Said bill of complaint is also altogether multifarious in that in connection with the alleged cause of suit upon contract, and an alleged cause of suit as taxpayer, it also attempts to set up a cause of suit for threatening to take the property of plaintiff without due process of law.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant demurs thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

EDWARD HORSKY,
City Attorney.
TOOLE & BACH,
Solicitors for Defendant.

48 DISTRICT OF MONTANA, }
County of Lewis and Clarke, } *ss:*

Edward Horsky makes oath and says: That he is the city clerk and attorney of and attorney for defendant City of Helena, in the

above-entitled cause, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

EDWARD HORSKY.

Subscribed and sworn to before me this thirteenth day of May, 1901.

CHARLES R. GARLOW,
Notary Public in and for Lewis and Clarke County, State of Montana.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

EDWARD HORSKY,
Of Counsel for Defendant.

(Endorsed:) Title of court and cause. Demurrer to bill. Filed May 13th, 1901. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 16th day of May, A. D. 1901, a plea to the bill of complaint was filed herein, which said plea was entered of final record as follows, to wit:

49 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant.

Plea.

The plea of The City of Helena, the above-named defendant, to the bill of complaint of The Helena Water Works Company, the above-named complainant.

To the honorable the judge of the circuit court of the United States, ninth circuit, district of Montana:

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, for plea to the whole of said bill, says that on or about the — day of October, A. D. 1900, a certain action was commenced by the above-named defendant, City of Helena, pursuant to an ordinance of the city council of said city of Helena, theretofore duly passed and adopted, in the district court of the first judicial district of the State of Montana, in and for Lewis and Clarke county,
50 against the owners or claimants of those water rights of Prickly Pear creek, comprising the waters of McClellan creek, and taken from that portion of said Prickly Pear creek lying wholly

in the said county of Lewis and Clarke, State of Montana, for the purpose of condemning three hundred and fifty (350) inches of said water rights of Prickly Pear creek, comprising the waters of said McClellan creek, to supply the said city of Helena and its inhabitants with water, which said suit is now pending in said district court of the first judicial district of the State of Montana, in and for Lewis and Clarke county.

And defendant further says that on or about the — day of February, A. D. 1901, the above-named defendant, The City of Helena, commenced a certain action in the district court of the fifth judicial district of the State of Montana, in and for Jefferson county, pursuant to ordinance No. 483, duly passed and adopted by the city council of said city of Helena, and approved by the mayor, on the third day of December, A. D. 1900, a copy of which said ordinance is more fully described in and set *in hæc verba* and made a part of the bill of complaint herein, against the owners or claimants of the right to the use of the waters of McClellan creek, a stream of water situated in Jefferson county, State of Montana, for the purpose of acquiring by the exercise of the right of eminent domain the right to the use of three hundred and fifty (350) inches of the waters of said McClellan creek, to supply the said city of Helena and its inhabitants with water, each of which said actions is now pending and undetermined, and on account whereof this court has no juris-
51 diction to in any manner interfere with said proceedings in either of said district courts, or any thereof, of the legitimate results thereof.

And defendant further says that there is now pending in the district court of the first judicial district of the State of Montana, in and for Lewis and Clarke county, an action between complainant herein, as plaintiff, and the defendant herein as defendant, which said action was commenced prior to the filing of the bill of complaint herein, namely, on the 5th day of April, 1901, for the purpose of obtaining a temporary injunction, enjoining and restraining said City of Helena, from allowing or ordering paid any claims or demands presented for materials furnished or services rendered said city during the time it has been or will be indebted in excess of three per cent. of the assessed value of the taxable property as ascertained by the last assessment for State and county taxes, except the claims and demands of this complainant for water furnished said city, or which may hereafter be furnished said city, and requiring and commanding the city clerk and mayor of said city to desist and refrain from signing or issuing warrants for any such claims or demands, and commanding and requiring the city treasurer of said city to desist and refrain from paying any warrants issued on account thereof, and the said City of Helena then was and ever since has been and now is enjoined and restrained from doing any of said acts mentioned, and from issuing any warrant or warrants or paying out any money for any purpose whatsoever; which said
52 action is now still pending and undetermined in said district court, and on account whereof this court has no jurisdiction

to in any manner interfere with any of the proceedings in said district court, or any thereof, or the legitimate results thereof.

And defendant further says that on or about the — day of March, A. D. 1900, Harry B. Palmer commenced a certain action in the district court for the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, against said defendant City of Helena, for the purpose of enjoining and restraining said city and the city counsel thereof, from auditing, allowing, or ordering paid any claim or demand against said city on account of any indebtedness incurred at any time when the indebtedness of the said city exceeded or exceeds three per cent. of the assessed value of the taxable property in said city of Helena, as ascertained and shown by the last assessment of said property for State and county taxes, prior to the incurring, creating, or contracting said indebtedness, which said action is still pending and undetermined, and on account whereof this court has no jurisdiction to in any manner interfere with said proceedings in said district court, or any thereof, or the legitimate results thereof.

All of which matters and things said defendant doth aver to be true, and it pleads to said complainant's bill, and prays the judgment of this honorable court, whether it shall be compelled to make any other or further answer to said bill, and prays to be
53 hence dismissed with its costs and charges in that behalf most wrongfully sustained.

EDWARD HORSKY,
R. LEE WORD, AND
TOOLE & BACH,
Of Counsel for Defendant.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

EDWARD HORSKY,
Of Counsel for Defendant.

STATE OF MONTANA, }
County of Lewis and Clarke, } ss:

Edward Horsky, being first duly sworn, says that he is an officer of the above-named defendant, to wit, the city clerk thereof; and that the foregoing plea is true in point of fact and not interposed for delay.

EDWARD HORSKY.

Subscribed and sworn to before me this 16th day of May, A. D. 1901.

CHARLES R. GARLOW,
Notary Public in and for Lewis and Clarke County, State of Montana.

Due service of the foregoing plea and receipt of a true copy thereof are hereby acknowledged and admitted this 16th day of May, 1901.

CLAYBERG & GUNN,
Attorneys for Complainant.

(Endorsed:) Title of court and cause. Plea. Filed May 16, 1901. Geo. W. Sproule, clerk.

54 And thereafter, to wit, on the 23d day of December, 1901, an order was duly made and entered overruling defendant's demurrer and plea, which said order is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY
vs.
THE CITY OF HELENA. } No. 619.

Order Overruling Demurrer and Plea.

This cause came on regularly at this time for the decision of the court, and, after due consideration, it is ordered that a temporary injunction issue herein as prayed for in complainant's bill of complaint and motion, upon said complain-t giving a bond in the sum of twenty-five thousand dollars ($25,000), within ten days.

And it is further ordered that defendant's demurrer to bill of complaint of complainant be, and the same hereby is, overruled.

And it is further ordered that the plea of defendant be and the same hereby is overruled.

Done in open court, December 23d, 1901.

55 And thereafter, to wit, on the 21st day of February, 1902, an answer was filed herein, which said answer is entered of final record as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. —.

Answer to Bill of Complaint.

Now comes the defendant, The City of Helena, and files its answer to the complaint of the plaintiff herein, and charges and avers:

This defendant now, and at all times hereafter, saving to itself

all and all manner of benefit of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties, or imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised is material or necessary for it to make answer to, answering says:

I.

Admits the allegations contained in paragraphs 1 to 18 of plaintiff's bill of complaint, except as hereinafter set forth; and that this defendant denies that the said plaintiff or its predecessors in
56 interest has complied with all the terms and conditions contained in the said ordinance No. 248, as set forth in said bill of complaint, or that it has substantially complied with the material requirements thereof.

II.

Denies that the water system and supply of said Helena Consolidated Water Company was accepted by said defendant City of Helena, as complying with the requirements of said ordinance No. 248, or in any other manner, or at all, other than as hereinafter set forth.

III.

Denies that the said James H. Mills, as receiver, as alleged in said bill of complaint, furnished water in compliance with the terms or provisions of said ordinance No. 248, or the contract embraced therein, or that he carried on and conducted the business of said company as in said bill set forth, and further denies that he complied with all or any of the terms, or conditions, or provisions, of said ordinance No. 248, or the contract contained therein on the part of the said Helena Consolidated Water Company, or its successors or assigns.

IV.

Denies that The Helena Water Company, the complainant in said action, has complied either fully or otherwise, or in any manner, or at all, with the terms, or provisions, or conditions, of the said ordinance No. 248, or the contract therein contained, on the part of the said Helena Consolidated Water Company, its successors or assigns, to be kept and performed.

57 V.

Admits that in the month of December, 1899, the city council of the said defendant City of Helena, passed and adopted ordinance No. 467 entitled, "An ordinance relating to the procurement of a water system and supply for the city of Helena, which shall own and control said water system and supply and devote the revenues derived therefrom to the payment of the debt incurred therefor, and providing for the submission to the taxpayers affected thereby of

the question of extending the limit of indebtedness of said city over and above the three per cent. limit provided by section 6, of article XIII, of the constitution of the State of Montana, for the purpose of securing such water system and supply;" and admits that said ordinance was approved by the mayor of said city on the fourth day of December, 1899, as alleged in said bill of complaint; denies that said complainant or its predecessors in interest have, for more than ten years, or at any time last past, furnished water to the said city, and the inhabitants thereof, through the said water plant and system owned and controlled by it, and avers that it only furnished water to a portion of the inhabitants of said city, and then in insufficient quantity and quality to meet the necessities thereof, in accordance with the terms of said ordinance. And denies that the said City of Helena has accepted and used such water during all of said time, or any of said time, except for the reason that it
58 had no other source of supply. And denies that the same was furnished in accordance with the requirements of said ordinance.

VI.

Defendant further admits that notice of an election was given and published for the time and in the manner provided by said ordinance, and that judges of election were appointed by the mayor of said city, and that said election was held on the eighteenth day of January, 1900, as by said ordinance required, and that a majority of the voters who voted at said election voted "Yes," and in favor of the proposition of extending the limit of indebtedness of said city to procure a water system and supply, as determined by the city council of said city upon canvassing said votes, and that the assessed value of the taxable property of the said city of Helena, was and is as stated in said bill of complaint; and admits that in the month of December, 1900, the said city council of said defendant, The City of Helena, duly passed and adopted ordinance No. 483, entitled, "Amending ordinance No. 482, authorizing the taking of all the water and water rights of McClellan creek and those water rights of Prickly Pear creek, comprising the waters of said McClellan creek, for the purpose of procuring a water supply for the city of Helena, Montana, which shall own and control the same, and authorizing the commencement of condemnation proceedings for such purpose." And that said ordinance was approved by the mayor of said city on the 3d day of December, 1900; and admits that at a meeting of the city council of the said defendant City of Helena, held on the 3d day of April, 1901, a preamble
59 and resolution was passed and adopted by said city council and approved by the mayor of said city as shown by Exhibit "D," referred to in said bill of complaint; and admits that the city purchased and paid for the water rights mentioned and described in paragraph 19 of the said bill of complaint, and avers that by virtue of its said purchase, and the payment therefor, it became and is the owner of said water rights, and that deeds were executed and

received, as in said paragraph stated; and this defendant avers that being so the owner of said water rights the same cannot be questioned by the said plaintiff, nor can its right to hold possession and use the same be questioned, except upon proceedings instituted in behalf of said State of Montana; and denies that said money was misapplied or misappropriated.

VII.

And this defendant, for answer to paragraph 20 of said bill of complaint, admits that it did, pursuant to said ordinance 483, commence an action in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, against certain of the owners and claimants of the right to use of the waters of McClelland creek, a stream of water situate in Jefferson county, Montana, and tributary to Prickly Pear creek, and flowing through said Lewis and Clarke county, Montana, for the purpose of acquiring by the exercise of the right of eminent domain the right to the use of 350 inches of the waters of said McClelland creek to supply the said city of Helena and its inhabitants with water, which said action is now pending and undetermined; and
60 defendant avers that on account thereof this court has no jurisdiction to interfere with any of the said proceedings in said district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, or in any of the legitimate results thereof, or in any of the rights that the said defendant may acquire under and by virtue of the said action, or in any of the rights of the said plaintiff which may be concluded thereby, which said action is in the nature of a proceeding *in rem*, and in which all parties interested may appear and defend or set up any right or equity they may have in the premises, and avers that this court has no right or power under the laws of Congress to in any manner interfere with the expenditures required for the prosecution of the said suit, or in any of the proceedings in that behalf, or in any proceeding proper or necessary to be had in said action, which said facts, in connection with said action, will more fully appear by the judgment roll therein, to which reference is hereby made.

VIII.

And this defendant admits that in the month of January, 1895, the defendant City of Helena commenced an action and proceeding in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, against the said Helena Consolidated Water Company, to obtain the issuance by said court of a writ of mandamus requiring and commanding the said company to furnish water to said city for fire, sewerage, and other municipal purposes, that in said action or proceeding it was finally ad-
61 judged and determined that the said Helena Consolidated Water Company was in duty bound and obliged to furnish water to said city for such purposes by virtue of having received the franchise granted by, and having accepted the terms, conditions and

provisions of said ordinance No. 248, and admits that a final judgment was rendered and entered by said court therein directing and ordering a peremptory writ of mandamus to issue, commanding and requiring the said company to furnish water to said city for such purposes; and that no appeal has been taken from said judgment, and that the same is now and has been at all times since its rendition in full force and effect; and this defendant avers that the said Helena Consolidated Water Company, the predecessor in interest of the complainant herein, refused, though requested so to do, to furnish water to the said City of Helena at reasonable rate-, from month to month, without any contract therefor, and thereupon said action was instituted by the said City of Helena to compel the said Helena Consolidated Water Company to furnish said city with water at a reasonable rate, from month to month, until such time as it might see fit to discontinue; and affiant further avers that the said water company was by law charged as a quasi-public corporation and enjoying the rights and privileges of the franchise in said bill of complaint described, and in duty bound to furnish said city with water from month to month at reasonable rates, and it was so adjudicated and determined in said action, by reason whereof the said plaintiff is estopped and concluded from asserting any right or bene-
62 fit under and by virtue of its said contract, and is bound and concluded by the said judgment, all of which will more fully appear by reference to the judgment roll in said cause.

IX.

Admits the allegations contained in paragraph 22 of the said plaintiff's bill of complaint, but denies that this defendant, The City of Helena, has never given complainant herein or its predecessors in interest, notice that it desires to purchase the plant and water supply of complainant, or that no offer has ever been made by said defendant, The City of Helena, to agree with the complainant upon the terms of such a purchase or to acquire the supply and plant of complainant, and avers that on the — day of ——, 1895, the city council of said defendant, City of Helena, duly passed and adopted a certain resolution or ordinance, authorizing the city clerk of said city to advertise for bids in the public daily newspapers of said city of Helena for the construction or purchase of a water system or supply to be owned and controlled by the said defendant, but that said defendant was prevented from so doing as aforesaid under and by virtue of a certain writ of injunction obtained at the instance of the said Helena Consolidated Water Company, the predecessor in interest of complainant herein, in an action wherein the said Helena Consolidated Water Company was plaintiff and the said mayor of the said defendant City of Helena was defendant, in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke; that said ac-
tion was founded upon a certain provision of subdivi-
63 sion of section 4800 of the Political Code of the State of Montana, as amended by the Fifth Legislative Assembly of said

State, commonly known and described as the Phelps Rider bill, and which is contained in the opinion of the court hereinafter referred to, and that said Phelps Rider and the provisions thereof *was* declared unconstitutional and void on appeal from said action of said district court to the supreme court of the State of Montana, as will more fully appear, reference being had to volume 19 of the Montana Reports, page 1.

X.

And this defendant admits that no election has ever been held by the said defendant, The City of Helena, at which either the question of issuing bonds or contracting on indebtedness for a water plant, or water system, or water supply, to be owned and controlled by said city has been submitted to the qualified electors of said city, as alleged in paragraph 23 of said bill of complaint, but denies that this defendant claims or pretends to have, authority to issue bonds and contract an indebtedness for a water supply and system to be owned and controlled by said city, or that the revenues from which shall be devoted to the payment of the indebtedness incurred therefor, or that said defendant, The City of Helena, threatens to or will issue said bonds or contract such indebtedness, unless restrained or enjoined from so doing by this honorable court, and avers that it does not and did not contemplate doing any of the said acts so complained of, but, on the contrary thereof, that it has been and now is and at all times mentioned in the said bill of complaint it
64 has been the intention, and so expressed at all times and on all occasions, to hold another election, at which election the question of issuing bonds or contracting an indebtedness for a water plant, water system, and water supply, to be owned and controlled by said city, shall be submitted to the qualified electors of said city, in full compliance with the terms and provisions of house bill No. 206, of the Fifth Legislative Assembly of the State of Montana, and in conformity with all the laws of said State applicable thereto.

XI.

This defendant admits that it is its intention to acquire a supply of water in addition to the supply it has already acquired by the purchase of the right to use of the waters of Beaver creek, and also a water plant and system in the city of Helena, for the purpose of supplying said city and the inhabitants thereof with water, and avers that it will do so by means of said action now pending in the district court of said Lewis and Clarke county, and in a certain action of like character now pending in the district court of the fifth judicial district of the State of Montana, in and for the county of Jefferson, on account whereof this court has no jurisdiction to in any manner interfere with the said proceedings, or any thereof, or the legitimate results to be accomplished, or any thereof; and also avers that there is now pending in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke an action between the complainant herein and the said de-

fendant herein, wherein said complainant is plaintiff and
65 this defendant is defendant, and in which said action this defendant has been enjoined and restrained from issuing any warrants or paying out any money, for any purpose whatsoever, on account whereof this court has no jurisdiction to interfere with the said proceedings, or any of the matters embraced therein, or which may legally result therefrom. That since the commencement of this action the injunction therein granted, has been dissolved in the district court, and from the order dissolving the same an appeal has been taken by the complainant herein, to the supreme court of the State of Montana, and that such appeal is still pending and undetermined.

XII.

Admits that this defendant intends to acquire a supply of water in addition to the supply it already has acquired, and that it intends to furnish and supply the said city of Helena and the inhabitants thereof with water, unless enjoined and restrained from so doing by this honorable court, and avers that it has, under the laws of said State, and under and in pursuance of the ordinances aforesaid, a perfect right and authority so to do, and denies that said ordinances numbered respectively 467 and 483, and the said preamble and resolution adopted and approved as alleged in said complaint, impair the obligation of the contract between said complainant and said city, or that such results, on account of the approval and acceptance of the said ordinance, No. 248, or that any of the acts and things done or caused to be done by this defendant, is in violation of section 11, article III of the constitution of the State of Montana, or section 10, article I of the Constitution of the United States,
66 and denies that unless this defendant is enjoined or restrained from carrying out its said design and purpose of acquiring a water plant and system and supply, or in engaging to furnish water to said city and its inhabitants, that the franchise granted by said ordinance No. 248, or any right or privileges conferred thereby, or the contract contained therein, will be confiscated or taken without just compensation or in violation of section 14 of article III of the constitution of the State of Montana, and avers that this defendant has a legal and equitable right to so provide a water plant for the purposes aforesaid, and that having such right, all the depreciations or injury that said complainant may sustain must and should be borne by it, and denies that by reason of this defendant so constructing and maintaining a water plant and supply of its own, and for the purpose of furnishing and supplying the inhabitants of said city with water, that the same will result in taking the property of said plaintiff, or the rights and privileges conferred thereby, without due process of law or in violation of the fourteenth amendment of the Constitution of the United States; and denies that there will be levied and assessed or collected of said complainant any taxes whatever, except such as it is compelled and required to pay as a taxpayer of the said city of Helena, or that any injury or damage

will result to said complainant, except such as it is by law required to undergo and sustain.

I.

And this defendant, for a further and affirmative defense
67 and plea, shows unto this honorable court that heretofore, to wit, on the 14th day of December, 1895, the complainant herein commenced its action in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, against this defendant, to enjoin and restrain it from taking any proceedings or accepting any bid or bids for the construction, establishment and maintenance of a water system of its own, and being the water system mentioned and described in the bill of complaint herein, and in said action set up its rights under the contract and ordinance in said plaintiff's bill of complaint mentioned; that it was therein alleged and claimed that this defendant, The City of Helena, was not authorized so to construct and maintain said water plant and system, but, on the contrary thereof, was required to purchase the water plant of the said complainant, and that such proceedings were had and done in said cause as that on the eighth day of February, 1897, judgment was duly given and made in said district court in favor of the said complainant herein and against this defendant, enjoining and restraining it from the said acts complained of; that afterwards this defendant duly appealed from said order to the supreme court of the State of Montana, and that on the 20th day of June, 1897, said appeal coming on to be heard, the same was reversed, and the order of said court set aside, on account whereof it has been adjudicated and determined that this defendant is entitled to construct, establish and maintain the said water system in the bill of complaint herein set forth, and on account
68 whereof the said complainant is barred and estopped from maintaining this action concerning all of the said matters so adjudicated as aforesaid; all of which facts will more fully appear, reference being had to the judgment roll in said cause, and the decision by the said supreme court of Montana contained in the 20 Montana Reports, pages 1 to 13, inclusive.

II.

And this defendant avers that it has not and had not any power or authority to confer or secure to said complainant any exclusive right to furnish water to said city or the inhabitants thereof, nor did it do so or attempt to do so by contract, ordinance or otherwise; that under the power conferred upon this defendant it had and has the right to construct and erect a water plant of its own, and purchase or condemn water rights therefor, so as to supply this defendant and the inhabitants of said city with water, whenever in its judgment it was expedient to do so, which said power was and is a public right, and has not been relinquished or conveyed away by contract, ordinance or otherwise, if it had the power to do so, but,

on the contrary, such rights of the public so conferred upon this defendant have at all times been held and retained by it; that in the exercise of its discretion, and in pursuance of said rights of the public, it became and was necessary and proper to purchase and obtain by condemnation proceedings water suitable and necessary to furnish said plant and supply, the said city and the inhabitants thereof, with water, as one of the necessary and proper steps in the exercise of said right on behalf of the
69 public, and that the actions and proceedings mentioned in said bill of complaint, were commenced and are now pending in said courts for said purpose, and that if defendant is enjoined from constructing and erecting said plant for the purpose aforesaid, and not permitted so to do, the objects, purposes and results of said actions so commenced and pending as aforesaid will be void and unavailing, on which account it will be compelled to abandon and discontinue said actions, and the jurisdiction theretofore acquired by said courts, substantially and effectively transferred to this court, contrary to the acts of Congress in such case provided.

And this defendant, further answering said bill of complaint, avers that the alleged contract and ordinance imposes an obligation upon said complainant to furnish water to said city and the inhabitants thereof for the period of twenty years, which said obligation is discharged by this defendant exercising the public rights aforesaid in the meantime, and which it neither expressly nor otherwise contracted or agreed not to do, and that the said obligation on the part of complainant herein was and is therefore conditioned that said city will not in the meantime construct and erect water works of its own, as it is now intending and seeking to do, as a public right and public duty, when so deemed by it expedient, the exercise of which constitutes the wrongs and grievances complained of.

Defendant therefore avers that the business functions of said city were only involved in said contract or ordinance, and that the
70 same did not include the relinquishment or surrender of the rights of the public, and duty of the defendant when it was in its judgment expedient to exercise the same, by constructing, operating and maintaining a water system or plant of its own, and that to the extent of any competition occasioned thereby said complainant is and will be relieved from its obligation to furnish and supply the inhabitants of said city with water, and that on account of the exercise of said right of the public, there can be and will be no taking of said complainant's property without due process of law, or any impairment of the obligation of its said contract, and that it is able to respond in damages for any wrongful or unlawful act or thing done or cause- to be done by it.

And this defendant further alleges and shows unto this honorable court that said complainant, and its predecessors in interest, and those in charge and conducting its said business, have wholly failed and neglected, and still fail and neglect to comply with the said alleged ordinance or contract in material and substantial requirements in this, to wit, in furnishing the said city and its inhabitants

with sufficient water and sufficient pressure, and in the quality thereof, and that said city has accepted said water, for and on account of having, during the time of said acceptance, no other course of supply, and for no other reason or purpose.

Wherefore, this defendant having fully answered, confessed, traversed, and avoided or denied all the matters in the said bill of complaint material to be answered, according to its best knowledge and belief, humbly pravs this honorable court to enter its judg-
71 ment that this defendant be hence dismissed with its reasonable costs and charges in this behalf, most wrongfully sustained; and for such further and other relief in the premises as to this honorable court may seem meet and in accordance with equity.

EDWARD HORSKY,
City Attorney for said City of Helena.

R. LEE WORD,
TOOLE & BACH,
Of Counsel for Defendant.

We hereby certify that in our opinion the foregoing plea is well founded in point of law.

EDWARD HORSKY,
City Attorney.
R. LEE WORD,
TOOLE & BACH,
Of Counsel for Defandant.

Service of copy made this 21st day of February, 1902.
CLAYBERG & GUNN,
Solicitors for Complainant.

(Endorsed:) Title of court and cause. Answer. Filed and entered February 21, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy.

72 And thereafter, to wit, on the 20th day of June, 1902, a stipulation allowing amendment to bill was filed herein, which said stipulation is entered of final record as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
CITY OF HELENA, Defendant.
} No. 619.

Stipulation Allowing Amendment to Bill of Complaint.

It is hereby stipulated and agreed by and between the solicitors for the respective parties to the above-entitled cause that the bill of

complaint therein may be amended by the filing of an amendment thereto, a copy of which is hereto attached, and that for the purpose of making such amendment the replication heretofore filed may be withdrawn. It is further stipulated that the statements and allegations contained in said amendment shall, for the purpose of this suit, only be taken, considered and treated as true, and stand admitted the same as though specifically admitted by the
73 answer in said cause and that the said answer shall stand and be taken as an answer to said bill of complaint as amended.

Dated this 20th day of June, A. D. 1902.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Complainant's Solicitors.
EDWARD HORSKY, *City Attorney.*
WORD & WORD AND
TOOLE & BACH,
Defendant's Solicitors.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Amendment to Complainant's Bill of Complaint Herein.

Now comes the complainant, and with the consent of the defendant, and by leave of court first had and obtained, files this its amendment to said bill of complaint, the same to be treated and considered as paragraph 9½ of said bill, and alleges:

74 9½. That heretofore and on the first day of July, 1889, the Helena Consolidated Water Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, made, executed, acknowledged, and delivered to the Boston Safe Deposit and Trust Company, as trustee, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, its certain mortgage or trust deed wherein and whereby there was granted, bargained, sold and conveyed to the said trustee all property of the said Helena Consolidated Water Company which it then owned or might thereafter acquire, as security for the payment of certain bonds and obligations of said water company thereafter to be issued in an amount not exceeding one million ($1,000,000) dollars; that on the 2d day of August, A. D. 1890, the said Helena Consolidated Water Company also made, executed and delivered to the said Boston Safe Deposit and Trust Company, as trustee, its certain other or supplemental mortgage or trust deed, wherein and whereby there was granted, bargained, sold and conveyed to the said Boston Safe Deposit and Trust Company, as trustee, to secure the payment

of the same indebtedness and bonds, all property, real, personal and mixed, then owned by it, including the water plant, system and supply by and through which it was then furnishing and supplying the said city of Helena and its inhabitants with water under and pursuant to the provisions of said ordinance No. 248, and also including all rights, privileges, and franchises granted and conferred by said ordinance and the contract therein contained; that the bonds of said water company, the payment of which was secured by said mortgages or trust deeds as aforesaid to the amount
75 of eight hundred and eighty-one thousand ($881,000) dollars, were issued and sold and were outstanding prior to January 1st, 1895; that thereafter and on the 2d day of December, 1896, a suit was commenced in the circuit court of the United States, ninth circuit, in and for the district of Montana, by the said Boston Safe Deposit and Trust Company, as trustee, against the Helena Consolidated Water Company, by the filing of a bill of complaint for the foreclosure of said mortgages or trust deeds, as aforesaid, and for the sale of the property described therein and the application of the proceeds of such sale to the payment and satisfaction of said bonds issued by said water company and then outstanding and unpaid, amounting in the aggregate to the sum of eight hundred and eighty-one thousand ($881,000) dollars; that in said suit so commenced the said Helena Consolidated Water Company appeared, and the court having jurisdiction of the parties and the subject matter, a decree was duly and regularly passed and entered on the 13th day of December, 1897, foreclosing said mortgages or trust deeds and authorizing and directing a sale of said property described therein; and that pursuant to such decree said property was sold as hereinafter more fully alleged and set forth.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Solicitors for Complainant.

(Endorsed:) Title of court and cause. Stipulation allowing amendment to bill. Filed June 20, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy clerk.

76 And thereafter, to wit, on the 20th day of June, 1902, the following order was duly made and entered, which said order is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY
vs.
CITY OF HELENA. } No. 619.

Order Granting Leave to Amend Bill of Complaint, etc.

On motion of M. S. Gunn, Esq., of counsel for plaintiff, said plaintiff is hereby granted leave to amend its complaint herein by interlineation, by changing the letter and word "a," on page 3, line 7, to the word "said."

On filing of a stipulation herein plaintiff granted leave to file an amendment to bill of complaint, and said plaintiff granted leave to withdraw replication herein and refile the same in accordance with the stipulation as filed.

Done in open court, June 20th, 1902.

77 And thereafter, to-wit, on the 20th of June, 1902, amendment to bill of complaint was filed herein, which said amendment is entered of final record as follows, to-wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Amendment to Complainant's Bill of Complaint Herein.

Now comes the complainant, and with the consent of the defendant, and by leave of court first had and obtained, files this its amendment to said bill of complaint, the same to be treated and considered as paragraph 9½ of said bill, and alleges:

9½. That heretofore and on the first day of July, 1889, the Helena Consolidated Water Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, made, executed, acknowledged, and delivered to the Boston Safe Deposit and Trust Company, as trustee, a corporation organized and
78 existing under and by virtue of the laws of the State of Massachusetts, its certain mortgage or trust deed wherein and whereby there was granted, bargained, sold and conveyed to the said trustee all property of the said Helena Consolidated Water Company which it then owned or might thereafter acquire, as security for the payment of certain bonds and obligations of said

water company thereafter to be issued in an amount not exceeding one million ($1,000,000) dollars; that on the 2d day of August, A. D. 1890, the said Helena Consolidated Water Company also made, executed and delivered to the said Boston Safe Deposit and Trust Company, as trustee, its certain other or supplemental mortgage or trust deed, wherein and whereby there was granted, bargained, sold and conveyed to the said Boston Safe Deposit and Trust Company, as trustee, to secure the payment of the same indebtedness and bonds, all property, real, personal and mixed, then owned by it, including the water plant, system and supply by and through which it was then furnishing and supplying the said city of Helena, and its inhabitants with water under and pursuant to the provisions of said ordinance No. 248, and also including all rights, privileges and franchises granted and conferred by said ordinance and the contract therein contained; that the bonds of said water company, the payment of which was secured by said mortgages or trust deeds as aforesaid to the amount of eight hundred and eighty-one thousand ($881,000) dollars, were issued and sold and were outstanding prior to January 1st, 1895; that thereafter and on the 2d day of December, 1896,
79 a suit was commenced in the circuit court of the United States, ninth circuit, in and for the district of Montana, by the said Boston Safe Deposit and Trust Company, as trustee, against the Helena Consolidated Water Company, by the filing of a bill of complaint for the foreclosure of said mortgages or trust deeds, as aforesaid, and for the sale of the property described therein and the application of the proceeds of such sale to the payment and satisfaction of said bonds issued by said water company and then outstanding and unpaid, amounting in the aggregate to the sum of eight hundred and eighty-one thousand ($881,000) dollars; that in said suit so commenced the said Helena Consolidated Water Company appeared, and the court having jurisdiction of the parties and the subject-matter, a decree was duly and regularly passed and entered on the 13th day of December, 1897, foreclosing said mortgage or trust deeds and authorizing and directing a sale of said property described therein; and that pursuant to such decree said property was sold as hereinafter more fully alleged and set forth.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Solicitors for Complainant.

(Endorsed:) Title of court and cause. Amendment to bill of complaint. Filed June 20, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy.

80 And thereafter, to-wit, on the 20th day of June, 1902, a replication was filed herein, which said replication is entered of ffnal record as follows, to-wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant.

Replication.

This replicant, The Helena Water Works Company, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, The City of Helena, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, trav-
81 ersed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Solicitors and of Counsel for Complainant.

(Endorsed:) Title of court and cause. Replication. Filed and entered June 20th, 1902. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 30th day of June, 1902, a stipulation was filed which said stipulation is entered of final record as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Stipulation as to Agreed Statement of Facts.

It is hereby stipulated and agreed by and between the parties to the above-entitled suit, that the original papers referred to in
82 the "Agreed statement of facts" herein, may be used upon the trial, instead of the copies therein mentioned; and that

in case of appeal by either party, that the said copies may be inserted as required by said "Agreed statement of facts."

Dated June 28th, 1902.

CARPENTER & CARPENTER, AND
CLAYBERG & GUNN,
Solicitors for Complainant.
EDWARD HORSKY,
TOOLE & BACH, AND
R. LEE WORD,
Solicitors for Defendant.

(Endorsed:) Title of court and cause. Stipulation filed and entered June 30, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy.

And thereafter, to wit, on the 30th day of June, 1902, the agreement upon facts was filed herein, which said agreement is entered of final record as follows, to wit:

83 In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Agreement upon Facts.

It is hereby stipulated and agreed between the parties to the above-entitled suit, that the following statement of facts may be, and the same are hereby made the facts upon which the trial and determination of all of the questions and issues of law and facts shall be had and a final decree thereupon entered, and that the same may be adopted by said court as its findings herein for that and all purposes of said suit.

It is further stipulated and agreed that the facts herein agreed upon are limited and confined to this suit alone, and shall not be deemed as admissions upon the part of either party for any other purpose than as hereinabove set forth; and that no legal deductions set forth in said bill of complaint shall be deemed admitted.

It is agreed that each and all the allegations contained in complainant's bill of complaint as amended up to and including paragraph XX, are true and correct, except in so far as any legal
84 deductions are stated and made therefrom; and the further fact that in the purchase of Beaver Creek water the warrants issued in payment thereof have been paid, and said warrants were issued in exchange by said city for, and the deeds of conveyance for said waters were delivered to said city upon receipt of, said warrants, and that immediately after receiving said warrants, and de-

livering said deeds as aforesaid, said warrants were presented to the city treasurer on said 3d day of April, 1901, and immediately thereupon said city treasurer paid said warrants out of the cash on hand in the city treasury of said city derived from taxes levied and collected for general municipal and administrative purposes, and that it is now the legal owner and holder of the water so purchased.

II.

It is agreed that in the month of January, 1895, the defendant commenced the action and proceedings mentioned in paragraph XXI, of complainant's bill of complaint; and that in such action and proceedings it was finally adjudged and determined as shown and disclosed by the pleadings therein, the judgment thereupon entered, and the opinion of the court, all of which is made a part of this agreed statement of facts, and are hereto attached; and that said judgment is in full force and unreversed.

III.

That the indebtedness of the defendant is now and has been for several years last past, in excess of three per cent. (3 %) of the assessed value of all the taxable property in said city, as determined by the assessment for the State and county taxes during each and
85 all of said years. That said indebtedness is now, and has been for several years last past, in excess of the sum of four hundred and eighty-six thousand dollars ($486,000), and that the value of the taxable property during all of said times in said city, as determined by the assessment for the State and county taxes for each of said years, does not and has not exceeded the sum of thirteen million ($13,000,000) dollars, and that no election has ever been held by the said defendant, The City of Helena, at which either the question of issuing bonds or contracting an indebtedness for a water plant, water system and water supply to be owned and controlled by said city, has been submitted to the qualified electors thereof; and that no other election upon which proceedings to allow a water plant and supply are based, has been had, except as hereinafter stated.

IV.

That said defendant, The City of Helena, has never given the complainant notice that it desired to purchase its plant, franchise or water supply, and that no effort has ever been made by the said defendant to agree with complainant upon the terms of such a purchase to acquire the plant and water supply of complainant except as hereinafter stated in paragraphs VIII, and as follows:

That during the months of September and October, 1899, pursuant to an order of the city council of said defendant city, defendant advertised for sealed proposals in the "Helena Daily Independent,"
86 a daily newspaper of general circulation in said city and State; and in the "American Contractor," a weekly publication of general circulation in the city of Chicago, State of

Illinois, and throughout the United States, for sealed proposals for the "construction and purchase of a water plant and supply," in accordance with certain plans and specifications theretofore adopted by said city council, said proposals to be opened on November 6th, 1899. That said plans and specifications expressly stated therein and contained the following: "It is expressly understood that nothing herein contained shall prevent any company now operating a water plant in the city, or any other company or individual from submitting a bid for the sale of any plant now constructed, or one proposed to be constructed, upon a place different from that herein specified; but any such company or individual may submit any bid that it or he may desire, upon any other basis, and any and all such bids will be considered by the council in connection with any and all other bids received." And that in response to said advertisement, a proposition was received from complainant herein, through Edgerly & Crocker, by Francis M. Edwards, their agent, offering to sell to defendant the water plant and system of complainant herein for the sum of nine hundred and ninety thousand ($990,000) dollars. That at the time of receipt of said proposition by complainant, and the opening of bids by said city, to wit, November 6, 1899, the limit of indebtedness over and above the three per cent. (3%) limit fixed by the constitution had not yet been extended, and that thereafter, to wit, at an election of the taxpayers affected thereby, or said city of Helena held
87 on the 4th day of December, 1899, pursuant to an ordinance in that behalf duly passed and approved, the question was submitted to said taxpayers affected thereby, whether the limit of indebtedness should be extended ten per cent. (10%) over and above said three per cent. (3%) limit, for the purpose of procuring a water supply and system to be owned and controlled by said defendant, and which should devote the revenues derived therefrom to the payment of the debt incurred therefor; the last assessed valuation of said city theretofore for State and county taxes being the sum of ten million, seven hundred and forty thousand ($10,740,000) dollars; but that the majority of the taxpayers affected thereby, voting at said election voted "No," and against said proposed extension of 10 per cent. (10%), and that as a result thereof, the city council of said defendant was obliged to and did reject said bid and all others received.

That thereafter an election was held on the 18th day of January, 1900, as alleged in the complaint, at which the majority of the taxpayers affected thereby of said city, voted "Yes," and in favor of extending the limit of indebtedness of said city five per centum (5%), or in amount six hundred, fourteen thousand four hundred and seventy-five dollars and fifty cents ($614,475.50), over and above the three per cent. (3%) limit, for the purpose of procuring a water supply and system to be owned and controlled by said city, and which should devote the revenue derived therefrom to the payment of the debt incurred therefor; and thereafter on the 4th day of June,
88 1900, by ordinance No. 477, duly passed by the city council of said defendant, and approved by the mayor on said date,

said limit of indebtedness was, in accordance with said vote at said election, duly extended five per centum (5%) over and above the three per cent. (3%) limit, provided by section 6 of article XIII, of the constitution of the State of Montana, of the total assessed valuation of the taxable property of said city as ascertained by the last assessment theretofore for the State and county taxes, to wit, five per cent. (5%) of $12,287,510; namely, $614,475.50 over and above said limit of three per cent. (3%), for the purpose of procuring a water system and supply for said city, which shall own and control the same and devote the revenues derived therefrom to the payment of the debt incurred therefor; and that thereafter, said defendant in that behalf by the city council of said city duly authorized, commencing on the 7th day of June, 1900, and ending on the 20th day of June, 1900, advertised daily for sealed proposals, in the said "Helena Daily Independent," for a "water supply," and also for a "water supply and system" to be owned and controlled by said city, in accordance with certain plans and specifications therein referred to and theretofore adopted by the city council of said city; said proposals to be opened on June 25, 1900, at the regular meeting of the city council on said date. That said plans and specifications in said advertisement referred to were as hereinbefore stated. But that no bid or proposal or response of any kind whatsoever to said advertisement was made by complainant herein, or by said defendant received from complainant in response thereto.

89

V.

That the City of Helena contemplates and intends to do all acts and things necessary to secure a water supply and system to be owned and controlled by the said City of Helena, and that it contemplates and intends to raise funds and revenue therefor in the manner provided by law, and to use the same for said purpose, and to furnish and supply the City of Helena and the inhabitants thereof with water from its said plant, and that it contemplates and intends to purchase and secure a sufficient quantity of water for said purpose, and that complainant does not obtain any of its water supply from either Beaver, McClellan or Prickly Pear creeks.

VI.

That the ordinances Nos. 467 and 483, mentioned in paragraph XXVII of the complainant's bill of complaint, were duly passed and adopted and approved, and that unless said defendant, The City of Helena, is enjoined and restrained from acquiring a water supply, plant and system, it will proceed to acquire the same under said ordinances or such others as are necessary for said purpose as hereinbefore stated, and will engage in furnishing the said defendant, The City of Helena and its inhabitants with water suitable and proper for its use, and that to do so will depreciate the value of complainant's franchise and property as stated in paragraph XXVIII of the complaint; but that no injury of which complainant can

complain will result therefrom if defendant city has the rights claimed by it.

90 VII.

That the facts stated in paragraphs XXIX, XXX and XXXI of the complainant's bill of complaint are true, except as to the legal inferences and deductions made therefrom, and the further fact that the acts complained of will not result in great and irreparable injury and damage or any damage or injury to said complainant as a taxpayer or otherwise, unless it be found that the said acts are in violation of the rights of said complainant, and an unwarranted attempt to exercise powers and rights in behalf of said defendant, The City of Helena.

VIII.

It is also agreed that — an election held at said city on the 29th day of July, 1895, it was decided that the limit of the city's indebtedness might be extended under the constitution and laws passed in pursuance thereof by the legal voters of said city. That thereafter the city council of said city by resolution duly passed, directed the city clerk to advertise for bids for a supply of water to be furnished, owned and controlled by said city in accordance with plans and specifications theretofore adopted, and complied with the requirements of the law in such matters as hereinabove in paragraph IV stated. That on the 14th day of December, A. D. 1895, said The Helena Consolidated Water Company, predecesor in interest of complainant, commenced its action in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke,

91 by which it sought to enjoin the defendant from advertising and receiving bids for said purpose, and to which complaint, defendant, The City of Helena, duly filed its answer; that a restraining order was duly issued and an appeal therefrom duly taken to the supreme court of the State, and by that court the said judgment so appealed from, was reversed and said cause remanded with directions to said trial court to dissolve said injunction and dismiss said complaint; that thereupon a mandate duly issued and said injunction was dissolved and said complaint dismissed and judgment entered accordingly, all of which said proceedings are still in full force and effect and unreserved, and a copy of the pleadings, order for injunction, appeal, judgment and opinion of the supreme court *are* hereto attached and admitted with all the force and effect to which the same may be and are entitled.

IX.

That said defendant, City of Helena, has made no other efforts under the allegations of paragraph XXIV of said complaint than as herein set forth, and that it proposes and intends to construct and establish a water plant and system to be owned and possessed by it

prior to the expiration of the alleged contract and franchise of complainant, at such time as in its judgment and discretion it is feasible and proper so to do; and all actions and proceedings necessary therefor instituted and maintained; and that unless enjoined and restrained from so doing, it will, both before and after the expiration of said alleged contract and franchise, furnish and supply
92 the said city and the inhabitants thereof with water. That the revenue for said purpose will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended in accordance with the requirements of the constitution and provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it has no legal or equitable right to do so on account of the facts and admissions hereinbefore stated and made.

X.

And it is further agreed that said ordinance No. 248, is in full force and effect except in so far as it is or may be affected or modified by the ordinances or resolutions aforesaid.

XI.

And it is also further agreed that all the allegations in the said complainant's bill of complaint, alleged and not denied in the answer of defendant, be, and the same are, admitted as agreed facts, save and except the legal inferences and conclusions drawn therefrom by the pleader; and that all denials inconsistent with the facts herein agreed upon be, and the same are, hereby withdrawn; and said pleadings are made and construed to conform to the facts herein agreed upon.

93 Dated at Helena, Montana, this 28th day of June, A. *A.* 1902.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Solicitors for Complainant.
EDWARD HORSKY,
TOOLE & BACH, AND
R. LEE WORD,
Solicitors for Defendant.

The words "Helena Consolidated Water Company, predecessor in interest of complainant" were inserted on page 7 before signing.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Solicitors for Complainant.
EDWARD HORSKY,
TOOLE & BACH, AND
R. LEE WORD,
Solicitors for Defendant.

(Endorsed:) Title of court and cause. Agreement upon facts. Filed and entered June 30th, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy clerk.

94 And thereafter, to wit, on the 20th day of August, 1902, an order was duly made and entered, which said order is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

HELENA WATER WORKS COMPANY
vs.
CITY OF HELENA. } No. 619.

Order Allowing Papers to be Annexed to Agreement upon Facts.

On motion of Edward Horsky, Esq., attorney for defendant, and with consent of counsel for complainant, it is ordered that the following papers may be annexed to and made a part of the agreed statement of facts on file herein *nunc pro tunc* as of June 30th, A. D. 1902; *i. e.*, notice of appeal, order, injunction, complaint, and opinion in the case Helena Consolidated Water Company *vs.* Wm. L. Steele *et al.*, and judgment-roll in the case of State of Montana *ex rel.* etc. *vs.* Helena Consolidated Water Company.

Done in open court, August 20th, 1902.

95 And thereafter, to wit, on the 20th day of August, 1902, in accordance with an order of August 20th, 1902, the following papers were annexed to and made a part of the agreed statement of facts and filed *nunc pro tunc* as of the 30th day of June, 1902, and entered of final record as follows, to wit:

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

HELENA CONSOLIDATED WATER COMPANY, Plaintiff,
vs.
WILLIAM L. STEELE, Mayor of the City of Helena; MASSENA Bullard, City Clerk of the City of Helena; John B. Sanford, Wm. S. Spalding, Frank J. Edwards, Augustus McMurphy, Adelphus B. Keith, Jacob Fischer, George O. Freeman, John Wick, George H. Piatt, Edward L. Flaherty, Charles G. Stubbs, John B. Wilson, Jacob Post, and Jacob L. Walker, Comprising the City Council of the City of Helena, and The City of Helena, Defendants.

Notice of Appeal.

96 Please take notice that the defendants named in the above-entitled action hereby appeal to the supreme court of this State from the order granting an injunction therein made

and entered in the said district court on the 26th day of February, A. D. 1896, in favor of the plaintiff in said action and against said defendants, and from the whole thereof.

MESSENA BULLARD,
G. H. AND S. H. McINTIRE,
TOOLE & WALLACE,
Attorneys for Defendants.

Dated Helena, Montana, February 28th, 1896.

To the clerk of said district court, and to B. P. Carpenter, Esq., and Messrs. McConnell, Clayberg & Gunn, attorneys for plaintiff.

Service of the foregoing notice of appeal upon us this 28th day of February, A. D. 1896, is hereby admitted.

McCONNELL, CLAYBERG & GUNN,
B. P. CARPENTER,
Attorneys for Plaintiff.

97 STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

OFFICE OF THE SHERIFF.

I hereby certify that I received the annexed order on the 14th day of December, A. D. 1895, and personally served the same on the 14th and 17th day of December, A. D. 1895, upon William L. Steele, mayor of the city of Helena, (Dec. 17th), the City of Helena, by William L. Steele, mayor (Dec. 17th), Messena Bullard, city clerk of the city of Helena (Dec. 14th), by delivering to William L. Steele, mayor of the city of Helena, Massena Bullard, city clerk, personally, in the county of Lewis and Clarke, a copy of said order at the same time showing them the annexed original order and informing them of the contents thereof.

Dated Helena, Montana, December 20th, 1895.

J. H. JURGENS, *Sheriff,*
By C. H. MARTIEN,
Deputy Sheriff.

Service, $3.00.

98 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

HELENA CONSOLIDATED WATER COMPANY, Plaintiff,
vs.
WILLIAM L. STEELE, Mayor of the City of Helena; MASSENA BULLARD, City Clerk of the City of Helena; John B. Sanford, Wm. S. Spalding, Frank J. Edwards, Augustus McMurphy, Adelphus B. Keith, Jacob Fischer, George O. Freeman, John Wick, George H. Piatt, Edward L. Flaherty, Charles G. Stubbs, John B. Wilson, Jacob Post, and Jacob L. Walker, Comprising the City Council of the City of Helena, and The City of Helena, Defendants.

Order to Show Cause.

99 On the complaint of the plaintiff, duly verified and upon the affidavit of William A. Chessman, a copy of which is hereto attached, it is ordered that the defendants show cause before me, or before this court, at the city of Helena, on the 21st day of December, 1895, why an injunction should not be issued restraining them, and each of them, from advertising, or causing to be published a certain notice for bids for a water plant to be owned and operated by the city of Helena, and for such other and further relief as may be just.

And it is further ordered that the said defendants, and each of them, and their, and each of their, agents, servants and employees, be in the meantime restrained, and they and the said defendants, and each of them, and their, and each of their, agents, servants and employees, are hereby forbidden to suffer or commit any of said acts until the further order of this court, conditioned upon filing an undertaking in the sum of $500.

Dated December 14th, A. D. 1895.

HENRY N. BLAKE, *Judge.*

100 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

HELENA CONSOLIDATED WATER COMPANY, Plaintiff,
vs.
WILLIAM L. STEELE, Mayor of the City of Helena, ET AL., Defendants.

Injunction.

On return of the order to show cause made by this court on the 14th day of December, 1895, and returnable on the 21st day of December, 1895, and by consent of the parties adjourned from time to

time until this 26th day of February, 1896; after hearing counsel for the plaintiff and their proofs and evidence and after hearing counsel for defendants and their offers of proof, and no sufficient cause to the contrary being shown;

It is ordered that said order to show cause be, and the same is, hereby made absolute, on the said plaintiff executing and filing a written undertaking pursuant to the statute and the practice
101 of the court, to the effect that it will pay the said defendants such damages, not exceeding the sum of five hundred dollars ($500), as they may sustain by reason of the injunction, if the court shall finally decide that the plaintiff is not entitled thereto; and

It is further ordered that the defendants, and each of them, and their, and each of their, agents, servants, employees and attorneys, be, and they are hereby, enjoined from advertising, or causing to be published, any notice or advertisement calling for bids for a water plant, to be owned and operated by the city of Helena, and that said defendants, and each of them, and their, and each of their, agents, servants, employees and attorneys be enjoined and restrained from carrying out that certain resolution of the city council of the city of Helena passed on the 10th day of December, 1895, which was as follows: "That we now proceded to advertise for bids for a water supply to be owned and operated by the city of Helena."

Dated in open court this 26th day of February, A. D. 1896.

HENRY N. BLAKE, *Judge.*

102 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

HELENA CONSOLIDATED WATER COMPANY, Plaintiff,

vs.

WILLIAM L. STEELE, Mayor of the City of Helena; MASSENA Bullard, City Clerk of the City of Helena; John B. Sanford, Wm. S. Spalding, Frank J. Edwards, Augustus McMurphy, Adelphus B. Keith, Jacob Fischer, George O. Freeman, John Wick, George H. Piatt, Edward L. Flaherty, Charles G. Stubbs, John B. Wilson, Jacob Post, and Jacob L. Walker, Comprising the City Council of the City of Helena, and The City of Helena, Defendants.

Complaint.

Now comes the plaintiff, and for cause of action against said defendants alleges:

I. That it is now, and at all times hereinafter stated was, a corporation duly organized and existing under and by virtue of the laws of the State of Montana.

103 II. That the defendant, The City of Helena, is now, and at all times hereinafter stated was, a municipal corporation,

duly organized and existing under and by virtue of the laws of the State of Montana.

III. That the defendants, William L. Steele and Massena Bullard, are now respectively the duly qualified and acting mayor and city clerk of the city of Helena.

IV. That John B. Sanford, Wm. S. Spalding, Frank J. Edwards, Augustus McMurphy, Adelphus B. Keith, Jacob Fisher, George O. Freeman, John Wick, George H. Piatt, Edward L. Flaherty, Charles G. Stubbs, John B. Wilson, Jacob Post, Jacob L. Walker are now the duly elected, qualified and acting members of the city council of the city of Helena.

V. That this plaintiff is a taxpayer of the city of Helena and files this bill in its behalf as such taxpayer, and in behalf of all other taxpayers of the city of Helena similarly situated; and this plaintiff also brings this action in its own behalf as the owner of a water supply and water system in the city of Helena, which will be irreparably damaged and injured by the action of the defendants hereinafter alleged. That the indebtedness of said city of Helena *is* now exceeds, and at the time of the adoption of said specifications and at the time of the directing of said advertisement, exceeded the sum of three per cent. upon the assessed valuation of all property within the limits of said city property taxable as provided in the constitution of the State of Montana.

VI. That pursuant to the provisions of section 6 of article
104 XIII of the constitution of the State of Montana, and subdivision 64 of section 4800 of the Political Code of the State of Montana, the taxpayers affected thereby, by vote duly cast at an election regularly and legally held for that purpose on the 29th day of July, A. D. 1895, authorized and directed the city council to proceed to acquire its own water system and supply, and to issue bonds in payment thereof.

VII. That pursuant to ordinance numbered 95 of the city of Helena, a true copy of which ordinance is hereto attached, marked Exhibit "A," and made a part of this complaint, entitled, "Granting the use of the streets to George F. Woolston for the purpose of laying and operating water mains," duly passed and enacted by the city council of the city of Helena, and approved on the 13th day of February, 1887, and in pursuance of ordinance numbered 248, of the ordinances of the city of Helena, entitled, "To provide the city of Helena and its inhabitants with a permanent water supply," duly passed and enacted by the city council of the city of Helena and approved on the 15th day of January, 1890, a true copy of which ordinance is hereto attached, marked Exhibit "B," and made a part of this complaint, the plaintiff and its predecessors in interest proceeded in good faith to establish and maintain, and for over five years last past has in good faith established and maintained a system of water supply in said city, through and by means of which it has for over five years last past furnished the city of Helena and the inhabitants thereof with an ample supply of pure and
105 wholesome water; that it is now maintaining such water supply, and is furnishing water as aforesaid to said city and its

inhabitants; that under and by virtue of the terms of said ordinance this plaintiff and its predecessors in interest were granted the franchise and right of laying its water mains throughout the streets, alleys and public places of the city of Helena, and to furnish water to said city and its inhabitants through the same; and that the franchise granted by said ordinance numbered 248, will continue in force, before its expiration, over fourteen years from this date.

VIII. That no other corporation, person or party has established or maintained any water system in said city, and there is not now in said city any other water system or supply for the purpose of supplying said city of Helena and its inhabitants with water than plaintiff's.

IX. That immediately after the determination of the election hereinabove referred to, it became and was the duty of the city council of the city of Helena to notify this plaintiff by the passage of an ordinance of its desire to purchase plaintiff's water system; that, although many months have passed since the determination of the result of said election, whereby it became the duty of said city council to pass the ordinance above referred to, the said city council has passed no ordinance notifying this plaintiff of the desire of said city to purchase plaintiff's water system, and has not in any way or manner notified this plaintiff of such desire, and has taken no steps or action in that regard, and utterly neglects,
106 fails, and refuses so to do; but, on the contrary, said city council of the city of Helena, by resolution heretofore adopted, has directed the city clerk of said city to advertise for bids for the construction and sale to the city of a complete water system, which advertisement is to continue for a period of sixty days and be published in newspapers published in the city of Helena, and in some newspaper published in the city of New York, in direct violation of the statutes of the State of Montana, and in violation of the rights of this plaintiff, not only as a taxpayer, but as the owner of said water system so established and maintained in said city.

X. That the advertisement so directed to be made by said city council is to be made upon the plans and specifications heretofore adopted by said city council, a true copy of which is hereto attached and marked Exhibit "C," and made a part of this complaint.

XI. That said resolution so passed by said city council determining to so advertise, is without any authority of law, and is beyond the power of said city council, and by such advertisement and the payment therefor it will misappropriate and divert a large amount of the trust funds of the city of Helena, or create a large liability, which can only be liquidated by the use of funds raised by said city by taxation in the past, or to be raised by said city by taxation in the future; and that this plaintiff, as a taxpayer of said city, is directly injured by such illegal act of said council; that said city threatens to so advertise immediately, and will do so unless restrained by this court.

107 XII. That under and by virtue of the laws of the State of Montana, said city has no power, right or authority to pur-

chase, own or control any water system or water supply, save and except that now owned and maintained by the plaintiff herein.

XIII. That said city, acting by and through its council and other officers, threatens to enter into a contract to purchase a water supply and system other than that owned by the plaintiff, pursuant to the terms of said advertisement so about to be made; that it threatens and will, unless restrained by this court, receive and accept a proposition or propositions to enter into a contract or contracts with the maker or makers of such proposition or propositions, to purchase a water supply or water system, in violation of the laws of the State of Montana, to the injury of this plaintiff as a taxpayer and to the great and irreparable injury and damage of its property.

XIV. That the plans and specifications so adopted by the said city council were prepared and adopted fraudulently and for the express purpose of preventing this plaintiff from making any bids thereunder or competing with any other person or corporation in a sale of a water supply to the city, and for the express purpose of preventing said city from purchasing the plant, system and water supply of this plaintiff and for the express purpose of enabling said city to cause to be constructed, and to purchase a water supply other than that owned by the plaintiff herein.

XV. That the plaintiff herein cannot become a bidder under said advertisement so threatened to be made, and cannot compete
108 upon said bids, for the reason that plaintiff's plant and system does not comply with the said plans and specifications so adopted by said city council.

XVI. That said plans and specifications are such that there can be no competition at said bidding, and that it would be impossible for the city to accept the lowest responsible bid.

XVII. That said advertisement is but a preliminary step taken by said defendants, and that it is the purpose and intention of said defendants to cause to be constructed and purchase a water system and supply other than that owned by this plaintiff; and that it will, unless restrained and enjoined by this court, proceed with the different steps to that end and eventually illegally issue a large amount of the bonds of said city in payment therefor.

XVIII. That all and singular the acts and threatened and intended acts of said defendants are without authority of law whatsoever, are illegal, and will cause great and irreparable injury to this plaintiff and its property.

XIX. That plaintiff has no plain, speedy or adequate remedy at law, but can only obtain relief in a court of equity.

Wherefore plaintiff prays that said defendants and each and all of them may be, by order of this court, restrained and enjoined from advertising for bids for a supply of water for the city of Helena and its inhabitants, and that plaintiff may have such other
109 and further relief as to the court may seem just, and that it recover its costs in this action.

B. P. CARPENTER AND
McCONNELL, CLAYBERG & GUNN.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

William A. Chessman, being duly sworn on his oath, says: That he is an officer of the above-named plaintiff, to wit, its president, and makes this verification for and in its behalf; that he has heard read the foregoing complaint, and that the matters and things therein stated are true of his own knowledge except as to such matters and things as are therein stated to be on information and belief, and as to such matters he believes it to be true.

WM. A. CHESSMAN.

Subscribed and sworn to before me this 14th day of December, A. D. 1895.

JNO. B. CLAYBERG,
Notary Public in and for the County of Lewis & Clarke, State of Montana.

EXHIBIT "A."

Ordinance No. 95.

Granting the use of the streets to George F. Woolston for the purpose of laying and operating water mains.

SECTION 1. From and after the date of the passage of this ordinance, and until the complete expiration of twenty years,
110 George F. Woolston and his successors and assigns, shall have, and they are hereby granted the license and privilege of laying water mains and pipes in any and all of the avenues, streets and alleys, public grounds and thoroughfares of the city of Helena, for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies or corporations within the said city desiring to purchase the same, and to said city for fire, sewerage and other purposes, in case said city desires to purchase the same, subject, however, to the provisions of this ordinance hereinafter contained, established, maximum rates, and generally to have and exercise all the rights, privileges and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city and to said city if required; provided, however, that nothing herein contained shall be so construed as to give to said George F. Woolston or his successor or assigns, the exclusive right or privilege of occupying said streets, avenues, alleys, public grounds and thoroughfares of said city with water mains or pipes, or the exclusive right of conveying, distributing and selling water throughout the city, or of furnishing the same to said city.

SEC. 2. For the purpose of laying, repairing, keeping and maintaining such water mains and pipes, there is hereby granted to said

George F. Woolston, and to his successors and assigns the right and privilege of digging ditches and making excavations in and upon any and all streets, avenues, alleys, public grounds and thor-
111 oughfares in the said city, provided that he or they shall without reasonable delay, restore the same to as good condition as they were before such excavations were made, and remove all sand, earth, rubbish or other material.

SEC. 3. The said George F. Woolston, and his successors and assigns, shall at all times during the period of twenty years to which the license and privilege granted by this ordinance is limited, provide a full and sufficient supply of water for the use and wants of the inhabitants of the said city for fire, sewerage and other purposes in case said city shall hereafter desire the same. Said water shall be pure and wholesome and free from animal, vegetable or mineral substances, that would render it unhealthful or unfit for domestic use. He or they shall not convey or distribute any water from the sources of the present supply of the said city, except by permission of a three-quarter vote of the city council, at a regular meeting after due notice of one month previous.

SEC. 4. The pressure in mains and pipes at the level of the first floor of the courthouse, now in progress of erection in said city and at all other points of equal height shall be maintained at not less than sixty pounds to the square inch, if reservoir works shall be used, and if a direct pressure system shall be used, sixty pounds to the square inch for pressure, and twenty-five to forty pounds to the square inch ordinary pressure, shall be maintained at this point and all others of equal height.

112 SEC. 5. That said George F. Woolston or his successor or assigns, shall lay thirteen and one-half miles of mains within the limits of said city, exclusive of the main or mains connecting his proposed works with the point or points of distribution, and such mains shall be of the following sizes, on the following streets respectively; at least ten inches in inner diameter, on Lawrence street from Benton avenue to Main street; on Rodney street from Broadway to Helena avenue; on Main street from Bridge street to Helena avenue; on Helena avenue from Main street to the right of way of the Northern Pacific Railway Company; on Broadway from Main street to Rodney street. At least eight inches in diameter on Madison avenue from Lawrence street to Davis street, in the Hauser addition; on Lawrence street from Madison avenue to Benton avenue; on Rodney street from Bridge street to Broadway; on Fifth avenue from Warren street to Hoback street; on Ninth avenue from Rodney street to Idaho avenue. At least five inches in inner diameter, on Benton avenue from Edwards street to Lyndale avenue; on Clore street from Bridge street to Benton avenue at Floweree street; on Lawrence street from Madison street to the western boundary of the townsite; on Clarke street from Strawberry street to Clore street; on Howey street from Adams street to Clark street; on Jefferson street from Adams street to Ming street; on Ming street from Jefferson street to Howey street; on Bridge street from Clore

street to Chaucer street; on West Main street from Bridge street south 1,090 feet: on Rodney street from Bridge street south 1,250 feet; on Wood street from Main street to
113 Ewing street from Bridge street to Broadway; on Ewing street from Bridge street to Broadway; on Ewing street from Fifth avenue to Helena avenue; on Jackson street from Wood street to Sixth avenue; on Sixth avenue from Jackson street to Main street; on Broadway from Rodney street to Beattie street; on Fifth avenue from Hoback street to Teijen street; on Gallatin street from Helena avenue to Fifth avenue; on Lyndale avenue from Benton avenue east 600 feet; on Third street, Northern Pacific addition; from Helena avenue north 500 feet; on Grand street from Jackson street to Warren street; on Warren street from Broadway to Helena avenue, on Hemlock street from Madison avenue to Harrison avenue; on Chaucer street from Bridge street to Broadway. At least four inches in inner diameter on Dearborn street from Lawrence street to Davis street, in Hauser addition; on Cutler street on West Main street to Rodney street; on Pine street from Joliet street to Rodney street; on Water street from Cutler street south 430 feet; on Breckinridge street from Rodney street to Beattie street; on Eighth avenue from Rodney street to Hoback street from Elizabeth avenue to Pflaume street. At least three inches in inner diameter on Davis street in Hauser addition, from Madison avenue to Benton avenue; on Strawberry street from Clark street to Lawrence street; on Adams street from Howey street to Jefferson street; on Beattie street from Broadway to Fifth avenue; on Hoback street from Fifth avenue to Eleventh avenue.

SEC. 6. The said George F. Woolston, or his successors or
114 assigns, shall place upon and connect with the thirteen and one-half miles of mains herein provided for, at points to be hereinafter designated by the city council of the said city, one hundred and fifty hydrants and shall maintain said hydrants during the continuance of this ordinance. Such hydrants shall have double nozzels, and shall be nonfreezing and of the latest and most approved pattern.

SEC. 7. The said George F. Woolston, and his successors and assigns are hereby required to lay and maintain in addition to the thirteen and one-half miles of mains hereinbefore provided for, such mains, of such sizes at such times and upon such streets, as the city council of said city shall from time to time direct, and shall place and maintain one hydrant for each one-tenth of a mile on such additional mains, if the same shall be of a diameter of six inches or more, or if the same shall be of a diameter of less than six inches, then one hydrant for each one-seventh of a mile; said hydrants to be of the pattern hereinbefore described.

SEC. 8. All mains and pipes shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location in streets, and all repairs and extensions of such mains and

pipes shall be under the supervision of the said street commissioner as to grade and locations in streets.

SEC. 9. It is hereby provided that in no case shall the mains or pipes to be laid and maintained under the provisions of this ordinance, in any manner interfere with the mains or pipes
115 legally laid in said streets so as to injure or obstruct the same, or the use thereof, nor shall such mains or pipes interfere or obstruct any sewer now existing in said streets nor shall there be any interference with any mains, pipes or sewers which may be hereafter authorized laid or constructed, by or under the authority of the said city of Helena, by mains laid hereafter by the said George F. Woolston, or his successors or assigns; and at all places and points in the said city; where said water mains and pipes approach gas mains or pipes, there shall be at least six inches of earth between the same.

SEC. 10. No water shall be conveyed to or distributed throughout said city in wooden conduits or open ditches and all mains and pipes and all material used in laying and repairing the same shall be new and first class in all respects and all mains and pipes shall stand a pressure of not less than four hundred pounds to the square inch.

SEC. 11. All water which may be required by said City of Helena, for the use of any and all buildings owned or occupied by said city for municipal purposes, shall be furnished by the said George F. Woolston, his successor or assigns, without cost or charge to the said city.

SEC. 12. In case of unavoidable accident or breakage of machinery, due time shall be given to said George F. Woolston, or his successor or assign to repair the damages, but he or they shall receive no pay from any person or corporation for any time during which they shall fail to furnish water from the causes in this section stated.

116 SEC. 13. The works hereby contemplated shall be so constructed and maintained as to interfere as little as possible with the rights and property of others, and any damage resulting from said works, or the erection, construction and operation thereof shall be repaired and paid for by the said George F. Woolston or his successors or assigns.

SEC. 14. The said George F. Woolston, his successors and assigns shall begin work within the city of Helena on the plant herein contemplated not later than the first day of June, 1887, and the system shall be completed and in readiness for the conveyance and distribution of water throughout the thirteen and one-half miles of mains hereinbefore provided for, before the thirty-first day of December, 1887, unless the same shall be prevented by unforeseen and unavoidable causes, in which case the time shall be extended for a time equal to the period lost by such detention; but in any event the system shall be completed and in operation by the first day of October, 1888.

SEC. 15. The charges for water furnished to any persons, bodies

or corporations in this city, shall not exceed the following rates: For private houses of four rooms or less, 85 cents per month, for private houses with more than four rooms, $1 per month; for each private bathtub, 33 cents per month. For each private water basin 25 cents per month. For each private water-closet 33 cents per month. For each private urinal, 33 cents per month. For irrigating lawns and grounds for each lot having fifty feet front or less, where other water is taken, eight dollars per year, or one
117 dollar per month for the months of May, June, July, August and September; where no other water is taken, twelve dollars per year, or one dollar and fifty cents per month for said months of May, June, July, August, and September; for each additional twenty-five feet front, twenty-five cents per month and a proportionate rate for fractions of twenty-five foot front. Any person, body or corporation applying for the same shall be entitled to purchase and place upon his or their service pipe a water meter, at his or their own cost or expense. Whenever any consumer of water is using the same wastefully, the said George F. Woolston or his successors or assigns may be also entitled to place a meter upon the service pipe of such consumer, at his or their own proper cost or expense, and charge meter rates for the water used. Where meters are used the charges shall not exceed the following rates, viz.: for 1,000 gallons per day, or less, 3 cents per 100 gallons; for 1,000 to 4,000 per day, 2½ cents per 100 gallons; for 4,000 gallons per day or more, 2 cents per 100 gallons. For manufacturing and other purposes, not provided for in this section, the said George F. Woolston, his successors or assigns, shall make special rates, but in no case shall the same be in excess proportionately, to the rates herein prescribed.

SEC. 16. The said George F. Woolston, and his successors and assigns, shall make no charge for tapping mains for the connection of service pipes, therewith and such connections shall be made at the cost of the applicant, by any plumber whom he may employ, but if any plumber fails to make such connections in a work-
118 manlike manner, or to restore the street to as good condition as it was before, he shall be liable in damages to the said George F. Woolston, or his successor or assigns, or to any other person or corporation injured thereby. In all cases, however, a permit must be had from said George F. Woolston or his successors or assigns. All service pipes shall be laid at least five feet below the surface.

SEC. 17. The said George F. Woolston and his successors and assigns shall have the right to put a stop-cock on each service pipe below the sidewalk near the curb at his or their own proper cost and expense, and shall box the same securely, placing the cover flush with the sidewalk. He or they may turn off the water from any premises when the water rates are not paid within a reasonable time, after the same shall have become due.

SEC. 18. In case the city council of said city shall during the continuance of this ordinance, purchase water from said George F. Woolston, or his successors or assigns, for fire, sewerage and other

purposes, said city council shall have power to govern by ordinances to be enacted from time to time, the general use of all hydrants which this ordinance requires said George F. Woolston and his successors and assigns to erect and maintain, and such control and care thereof as may be necessary to a full beneficial use of the same and the water through them for fire and sewerage purposes during the continuance of such contract of purchase, but such government, use, control and care thereof, shall not be unreasonable or in any
119 way interfere with any of the rights or contracts of said George F. Woolston or his successors or assigns, in case George F. Woolston, his successors or assigns fail to keep said hydrants in good repair, the said city council may repair the same, and deduct the amount thereof from the first payment thereafter to be made to George F. Woolston, his successors or assigns, for water furnished under such contracts.

SEC. 19. The said City of Helena expressly reserves the right to license and grant charters to other persons and companies to convey, distribute and sell water within said city to private consumers, now, however, in violation of this ordinance. The right is also expressly reserved by said city to enter into contracts with and purchase water for fire, sewerage and other purposes from other persons or corporations.

SEC. 20. The mayor and committee of the city council of said city, and any officer or other person authorized by said council, shall, at all times have free access to the entire works and system contemplated by this ordinance, for the purpose of inspecting, examining and testing the same, or any part or portion thereof.

SEC. 21. In case the city council of said city shall, during the continuance of this ordinance, purchase water from said George F. Woolston, his successors or assigns, for fire, sewerage and other purposes, the said city council shall have power in case of fire, to cause all service pipes to be disconnected and the use of water by all private parties to be disconnected for such time as the fire may continue, or the exigencies of the occasion demand.

120 SEC. 22. It is hereby expressly provided, that if at any time during the period of twenty years herein mentioned, the said George F. Woolston, his successors or assigns, shall in any manner fail to comply with all the terms of this ordinance, the city council of said city shall have the right, and such power is hereby reserved, to amend, modify or repeal this ordinance; provided, that such power, or right shall not deprive said George F. Woolston, his successors or assigns, of the franchise of maintaining water mains in said streets, and the right to sell and furnish water to the inhabitants of said city, during said twenty years, under such regulations as the city council may adopt. Provided, that in no case shall the rates charged for water, exceed those mentioned herein, nor shall the city council reduce the rates of water below those herein mentioned, during the twenty years for which this charter is granted.

SEC. 23. When the said George F. Woolston or his successors or

assigns, shall have completed the system hereby contemplated, he or they shall notify the city council of said city of such completion, whereupon said city council shall within ten days examine, inspect and test said system, and works, and if found to be in compliance with this ordinance, accept the same. Such test so far as fire streams are concerned shall be made by forcing six one and one-quarter inch streams through 100 feet of hose, each, at one and the same time under the pressure herein provided.

SEC. 24. Any person, except those who are authorized by the said George F. Woolston, or his successors or assigns, or by the
121 city council of said city, who hall in anyway disturb, interfere or meddle with any main, hydrant, connection, service pipe, fountain, reservoir, well, building, machinery, or any property of, or belonging to said George F. Woolston, or his successors or assigns, or by any means pollute or defile any reservoir, well, spring, or source of water supply, or any hydrant, fountain or receptacle receiving water from said works within the limits of said city, shall be deemed guilty of a violation of this ordinance.

SEC. 25. In case the city council of said city shall hereafter during the continuance of this ordinance purchase water from said George F. Woolston, or his successors or assigns, for fire, sewerage and other purposes, and a fire occurs, any person who shall attempt to hold possession of any of the hydrants which under this ordinance said George F. Woolston, or his successors or assigns are required to erect and maintain or who, having a key to any such hydrant, in his possession or under his control, shall refuse to turn over or furnish said key to any person duly authorized by said city council and permit to be turned on, or refuse to turn over said key and permit the water to be turned off at the proper time, shall be deemed guilty of a violation of this ordinance.

SEC. 26. Any person violating any of the provisions of this ordinance shall, on conviction before the police magistrate of said city, be punished by a fine of not less than five dollars, and not more that fifty dollars, or by imprisonment in the city jail for a period of not less than ten days nor more than ninety days.

SEC. 27. Wherever the word "streets" is used in this
122 ordinance, it shall be construed to mean streets, alleys, avenues, public grounds and thoroughfares.

SEC. 28. No provision contained in this ordinance respecting the size of the mains or pipes or of the pressure to be maintained, shall be construed to release or abate the obligation of the said George F. Woolston, and his successors and assigns, to furnish at all times a full and sufficient supply of water for the use of the inhabitants of said city, or for the use of said city for fire, sewerage and other purposes, in case the city council of said city, shall hereafter conclude to purchase water of said George F. Woolston, or his successors or assigns for such purposes. But the said George F. Woolston, or his successors or assigns shall not be required to furnish water at such points of such height that the pressure required at points herein mentioned will not deliver the supply.

SEC. 29. It is hereby declared to be the true intent and meaning and purpose of this ordinance, to provide the inhabitants of said city with an ample supply of water for domestic, manufacturing and other purposes and to provide an ample supply of water in said city so that if the city council of said city shall hereafter deem it necessary to purchase water from said George F. Woolston, or his successors or assigns, for fire, sewerage and other purposes, the same can be furnished.

SEC. 30. If the city council of the said city shall hereafter desire to purchase water from said George F. Woolston, or his successors or assigns, for fire, sewerage and other purposes, the said George F. Woolston, or his successors or assigns, shall provide and de-
123 liver the same at a cost to the said city not to exceed one hundred dollars per year per hydrant for the water delivered through the first one hundred and fifty hydrants herein provided for, and sixty-five dollars per year per hydrant for the water delivered through any additional hydrants erected and maintained by order of the said city council.

SEC. 31. In case the city council of said city shall at any time during the continuance of this ordinance, deem it for the best interests of said city, to purchase water from said George F. Woolston, his sucessors or assigns, for fire, sewerage and other purposes, the same shall be furnished by the said George F. Woolston, his successors or assigns under contracts to be hereafter made, upon terms to be hereafter agreed upon between the said city and George F. Woolston, his successors or assigns.

SEC. 32. Within sixty days after this ordinance shall become operative the said George F. Woolston, his successors or assigns shall file with the city clerk of said city, an acceptance in writing of all the terms, conditions and provisions, or this ordinance, which acceptance, shall be duly recorded in the official records of said city.

SEC. 33. It is not the intention of this ordinance to deprive George F. Woolston, his successors or assigns, of any right which he, or they may have under ordinance No. 93, as passed by the city council November 20th, 1886.

Approved February 13, 1887.

124 EXHIBIT "B."

Ordinance No. 248.

To provide the city of Helena and its inhabitants with a permanent water supply.

Whereas, the city council of the city of Helena, did advertise in the "Helena Herald," the "Helena Journal," and the "Helena Independent," for a period of forty days, to wit, from the 13th day of June, 1889, to the 1st day of August, 1889, with specifications, for

proposals for a water supply for the use of said city and the inhabitants thereof; and,

Whereas, it was found and determined upon an examination of the several proposals received in response to such advertisement, and after due consideration thereof, that George F. Woolston was the lowest responsible bidder therefor; and,

Whereas, the Helena Consolidated Water Company is the assignee and successor of said George F. Woolston; and,

Whereas, the city council of said city of Helena has awarded the said contract to the said Helena Consolidated Water Company as such assignee and successor;

Now, therefore, be it ordained by the city council of the city of Helena:

SECTION 1. There is hereby granted to the Helena Consolidated Water Company, and its successors and assigns, for the full term of twenty years from the passage hereof, the license and franchise of laying and maintaining water mains and pipes in and through all of the streets, alleys, avenues and public grounds of the city of
125 Helena for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies or corporations within the said city desiring to purchase the same, and to said city for fire, sewerage and other purposes, in case said city desires to purchase the same, subject, however, to the provisions of this ordinance hereinafter contained, establishing maximum rates, and generally to have and exercise all the rights, privileges and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city if required; provided, however, that nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Company or its successors or assigns, the exclusive right of occupying the streets, avenues, and public grounds of said city with water mains and pipes, or the exclusive right of conveying, distributing or selling the same throughout the said city, or of furnishing the same to said city, except as hereinafter set forth.

SEC. 2. For the purpose of laying, repairing, keeping and maintaining such water mains and pipes, there is hereby granted to said Helena Consolidated Water Company, and to its successors and assigns, the right and privilege of digging ditches and making excavations in and upon any and all streets, avenues, alleys, public grounds and thoroughfares of the city; provided, that it or they shall, without unreasonable delay, restore the same to as good condition as they were before the said excavations were made, and remove all earth, sand, rubbish and other materials.

126 SEC. 3. All pipes and mains, including service pipes connected therewith, shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location in streets; and all repairs and extensions of such pipes and mains shall be done under the supervision of said street commissioner as to grade and location in streets. Nothing contained herein shall preclude said City of He-

lena from regrading or changing the grade of any street or streets within said city, or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting, giving or granting any franchises, rights or easements to any person or persons, corporation or corporations whomsoever, so long as such franchises, rights and easements do not interfere with the franchise, rights and easements hereby granted. And that said Helena Consolidated Water Company must and shall look solely and exclusively to the person or persons, corporation or corporations to whom such franchises, rights or easements have been given by said city for any and all damages the said Helena Consolidated Water Company may sustain by reason of any interference with any of its pipes, mains or hydrants, or any exposure of the same caused by such person or persons, corporation or corporations.

SEC. 4. The works hereby contemplated shall be so constructed and maintained as to interfere as little as possible with the property of others; and any damage resulting from said erection, construction and operation thereof, shall be repaired and paid for by the
127 said Helena Consolidated Water Company, or its successors or assigns.

SEC. 5. It is hereby provided that in no case shall the mains and pipes be laid and maintained, under the provisions of this ordinance, in any manner — interfere with any mains or pipes legally laid in said streets so as to injure or obstruct the use thereof; nor shall such pipes or mains interfere or obstruct any sewer now in said streets, nor shall there be any interference with mains, pipes or sewers which may be hereafter authorized to be laid or constructed by or under the authority of said City of Helena, by mains hereafter laid by the said Helena Consolidated Water Company, or its successors or assigns, and at all places and points in the said city where said mains and pipes approach gas mains or pipes there shall be at least six inches of earth between the same.

SEC. 6. The said Helena Consolidated Water Company shall furnish and provide a full, ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction), and for other purposes; and such supply shall be full, ample and sufficient for the present population of the said city, and for the future population of the said city as the same may be from time to time during the full term of five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use.

128 SEC. 7. The pressure in pipes and mains at the level of the first floor of the courthouse of Lewis and Clarke county, in said city, and at all other points of equal height, shall be maintained at not less than sixty pounds to the square inch if reservoir works shall be used; and if the direct pressure system shall be used, sixty pounds to the square inch fire pressure, and forty pounds to the

square inch ordinary pressure shall be maintained at said points, and all other points of equal height.

SEC. 8. The said Helena Consolidated Water Company shall lay, or provide at its own cost and expense, twenty miles of mains within the limits of said city, exclusive of the amount of mains connecting the works of said company with the point or points of distribution, and such mains shall be of the following sizes and on the following streets in the said city of Helena, respectively: At least ten inches in inner diameter, on Lawrence street from Benton avenue to Main street; on Rodney street from Broadway, to Helena avenue; on Main street from Bridge street to Helena avenue; on Helena avenue from Main street to the right of way of the Northern Pacific Railroad Company; on Broadway from Main street to Rodney street; at least eight inches in inner diameter on Madison avenue from Lawrence street to Davis street in the Hauser addition; on Lawrence from Madison avenue to Benton avenue; on Rodney street from Bridge street to Broadway; on Fifth avenue from Warren street to Hoback street; on Ninth avenue from Rodney street to Idaho avenue. At least five inches in inner diameter on Benton avenue from Edwards to Lyndale avenue; on Clore street from Bridge
129 street to Benton avenue at Floweree street; on Lawrence street from Madison avenue to the western boundary of the city; on Clark street from Strawberry street to Clore street; on Howey street from Adams street to Clark street; on Jefferson street from Adams to Ming street; on Ming street from Jefferson street to Howie street; on Bridge street from Clore street to Chaucer street; on West Main street from Bridge street south 1,050 feet; on Rodney street from Bridge street south 1,250 feet; on Wood street from Main street to Ewing street; on Ewing street from Fifth avenue to Helena avenue; on Jackson street from Wood street to Sixth avenue; on Sixth avenue from Jackson street to Main street; on Broadway from Rodney street to Beattie street; on Fifth avenue from Hoback street to Tietjen street; on Gallatin street from Helena avenue to Fifth avenue; on Lyndale avenue from Benton avenue to Helena avenue; on Third street, Northern Pacific addition, from Helena avenue north 500 feet; on Grand street from *from* Jackson street to Warren street; on Warren street from Broadway to Helena avenue; on Hemlock street from Madison avenue to Harrison avenue; on Chaucer street from Bridge to Broadway; at least four inches in inner diameter, on Dearborn street from Lawrence street to Davis street in Hauser addition; on Cutler street from West Main to Rodney street; on Pine street from Joliet street to Rodney street; on Water street from Cutler street south 430 feet; on Breckenridge street to Beattie street; on Eighth avenue; from Eighth
130 avenue to Hoback street; on Eleventh avenue from Rodney street to Hoback street; on Hoback street from Eleventh ave- to Pflaume street; at least three inches in inner diameter on Davis street in Hauser addition, from Madison avenue to Benton avenue, on Strawberry street from Clark street to Lawrence; on Adams street; from Howie street to Jefferson street; on Davis street from Broadway

to Fifth avenue; on Hoback street from Fifth avenue to Eleventh avenue.

In making up the said twenty miles of mains, the said Helena Consolidated Water Company may put in and shall be allowed for any pipes or mains now laid in any of the streets of the city of Helena, and owned by the said water company, not counting, however, more than one main or pipe upon the same portion of any street, and in addition to such mains or pipes as are now laid, and which may be used under the provisions of this ordinance, the said Helena Consolidated Water Company shall lay such other mains, of such sizes, on such other streets as may be ordered by the said said city council of said city so as to make its full complement of mains within said city twenty miles.

SEC. 9. The said Helena Consolidated Water Company shall place down and connect with the twenty miles of mains herein provided for, at points to be designated by the city council, or a committee thereof, two hundred hydrants, and shall maintain said hydrants during the continuance of this contract. Said hydrants shall have double nozzles and shall be nonfreezing and of the latest and most improved pattern, and all connections of such hydrants with the
131 mains shall be not less than four inches in diameter. Provided, that if the contractor use any system of pipes and hydrants now in said city, and formerly belonging to the Helena Water Company, such hydrants need not be changed or removed, and said council shall not change or relocate the same, but such hydrants shall be considered as having been located by the said city council or committee thereof under the provisions of this ordinance. The location of mains and hydrants to complete the twenty miles of mains, and the two hundred hydrants provided for in this ordinance, shall be made by the city council when the said water company is ready to erect the same without delay or loss to the said water company.

SEC. 10. The said Helena Consolidated Water Company shall lay and maintain, in addition to the twenty miles of mains hereinbefore specified, such mains, of such sizes, at such times, and upon streets as the city council shall from time to time direct, which said work shall be commenced and prosecuted to completion with diligence and without unreasonable delay, and shall place and maintain one hydrant for each one-tenth of a mile on such additional mains, if the same shall be of the diameter of six inches or more, or if the same shall be of the diameter of less than six inches, then one hydrant for each one-seventh of a mile; said hydrants to be of the pattern above specified; no hydrant to be placed on any pipe of less than four inches in diameter.

SEC. 11. All water which may be required by said city of Helena for the use of any and all buildings owned and occupied by said city
132 for municipal purposes, and also all water necessary for street sprinkling purposes in said city, shall be furnished by the said Helena Consolidated Water Company without cost or charge to said city; provided, however, that in case the said city shall hereafter desire to use any water for street sprinkling purposes, the same must

be taken from the mains of the said Helena Consolidated Water Company by means of stand pipes erected at the cost and expense of said city, at such point or points as may be necessary upon the lines of mains of said company, and that said city shall not have the right to use any of the hydrants of the said company for the purpose of obtaining water for street sprinkling purposes.

SEC. 12. In case of unavoidable accident or breakage of machinery, due time shall be given to the said Helena Consolidated Water Company to repair the damages, but it shall receive no pay from any person or corporation for any time during which it fails to furnish water for the causes in this section stated.

SEC. 13. The works hereinbefore provided for, and the water system connected therewith, shall be completed and in readiness for the conveyance and distribution of water throughout the twenty miles of mains hereinbefore provided for, on or before the first day of July, 1890.

SEC. 14. The mayor and any committee of said council of said city, or any officer or person authorized by said council, shall at all times have free access to the entire works and system of the said Helena Consolidated Water Company, for the purpose of in-
133 specting and examining, or testing the same, or any part or portion thereof.

SEC. 15. The said Helena Consolidated Water Company shall, from and after the 20th day of January, 1890, until said system is completed in accordance with the terms of this contract, furnish the said city of Helena with water for fire, sewerage and other purposes through the hydrants included in the contract between the said City of Helena and the Helena Water Works Company, and the hydrants on such extensions as have been or may be ordered by the city council of said city, at the price herein provided for; but it shall not be required to complete its system for the conveyance and distribution of water through the twenty miles of mains herein provided for, before the first day of July, 1890.

SEC. 16. The charges for water furnished by the said Helena Consolidated Water Company to any persons, bodies or corporations in this city shall not exceed the following rates: For private houses, one dollar per month, for each private bathtub, thirty-three cents per month; for each private wash basin, twenty-five cents per month; for each private water-closet, thirty-three cents per month; for each private urinal, thirty-three cents per month. For irrigating lawns, gardens and grounds, where other water is taken, one dollar and twenty-five cents per month, for each fifty feet fronting on the street; where no other water is taken, one dollar and fifty cents per month. When revolving fountains and sprinklers are used, an extra price may be charged, which shall not exceed twenty-five per cent. in addi-
tion to the rate for irrigation above prescribed. Provided,
134 there shall not be more than one nozzle or sprinkler used for each fifty feet of frontage, at the rate specified in this section. All charges for irrigation shall be limited to the months of May, June, July, August, September and October. And in case any

person or persons, corporation or corporations, or company, shall use water for irrigation purposes at any other time than during the months herein mentioned, such person or persons, corporation or corporations, or company, shall pay to the said contractor, or its successors or assigns, for the use of such water for the time so used, upon the same terms per month as above stated. Where meters are used, the charge shall not exceed the following rates, viz: For one thousand gallons per day or less, four cents per one hundred gallons; for one thousand to four thousand gallons per day, three cents per hundred gallons; for four thousand gallons per day or more, two cents per hundred gallons. When said water company believes that water is being wasted or unnecessarily used, it may place a meter on the service pipe communicating with the said premises, but if it is found that such consumer is not using over thirty-three per cent. more water than the monthly rate would pay for according to the meter rates herein prescribed, the said water company shall be only allowed to collect the monthly rate herein provided. If the said consumer is using over thirty-three per cent. more than the monthly rate would pay for, then the said water company may collect meter rates as herein specified.

SEC. 17. The said Helena Consolidated Water Company shall make no charge for tapping mains for the connection of
135 service pipes therewith, except the actual cost of labor and materials required, and in no case to exceed two dollars and fifty cents for four inch mains, three dollars for six inch mains, three dollars and fifty cents for eight inch mains, four dollars for ten inch mains, and four dollars and fifty cents for twelve inch mains. Such connection shall be made at the cost of the applicant by any plumber who he may employ, but not, however, until such applicant shall have procured a permit for such connection from the said Helena Consolidated Water Company. Provided always, that said company shall not refuse to permit connections to be made by or to sell or deliver water to any persons who shall offer to pay for the same and shall comply with the provisions of this ordinance, and with such regulations as may be from time to time prescribed by the city council of said city, and the reasonable rules and regulations of said company.

SEC. 18. The said Helena Consolidated Water Company shall have the right to put a stopcock on each service pipe below the sidewalk near the curb, and at its own proper cost and expense, and shall box the same securely and place the cover flush with the sidewalk, and may turn off the water from any premises when the water rates are not paid with- fifteen days after the same shall have become due, and when said consumer has failed to comply with any reasonable rule or regulation of said company; but the said company shall not place any self-closing faucet or water bib upon any service pipe without the consent of the owner thereof.

136 SEC. 19. No person or persons, excepting the mayor and fire marshal, and those acting under their authority, or the authority of said city council, and the agents and employees of the

said water company, shall meddle with, or use any of the hydrants provided for in this ordinance, and any person violating this provision shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not less than five dollars nor more than fifty dollars. Said hydrants shall be used only for fire and sewerage purposes.

SEC. 20. From and after the 20th day of January, 1890, the said Helena Consolidated Water Company shall keep and maintain in the storage reservoir formerly belonging to the Helena Water Company and commonly known as the "Woolston reservoir," or in the reservoir formerly belonging to Helena Water Company, and commonly known as the "Hale reservoir," a depth of not less than six feet of water, and after the first day of July, 1890, shall keep and maintain in both of said reservoirs a depth of not less than six feet of water.

SEC. 21. There is hereby appropriated out of the yearly revenues of the said city of Helena, for the use and benefit of the said Helena Consolidated Water Company, its successors or assigns, during the full term of five years, from and after the 20th day of January, 1890, the following sums of money, to wit: Out of the general fund of said city the sum of twenty dollars per year for each hydrant required by this ordinance to be kept and maintained by the said Helena Consolidated Water Company, on the twenty miles of mains provided for in this ordinance and for the use of the water through said hydrants by said city for the purpose of
137 sewerage, and the sum of sixteen dollars and seventy-five cents per year for each additional hydrant, and water, as herein provided for, for the same purpose. Out of the fire department fund of said city the sum of eighty dollars per year, for each hydrant required by this ordinance to be kept and maintained by the said Helena Consolidated Water Company, on the said twenty miles of mains provided for in this ordinance, and for the use of the water through said hydrants by said city for the purpose of extinguishing fires and for the fire department; and the sum of fifty-eight dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purpose. And it is hereby made the duty of said city council during the said term of five years, to levy annual taxes under the provisions of the charter of said city authorizing the levy of taxes for general purposes, and for fire department purposes sufficient in amount to provide funds to meet the appropriations hereby made. For the purpose of carrying out the provisions of this section, the mayor and city clerk are hereby authorized, upon allowance by the city council to draw warrants on the above funds for the above amounts, and to pay the same unto the said Helena Consolidated Water Company, its successors or assigns, at the end of each month. Provided, however, that if the said company shall fail to comply with the requirements herein contained concerning the pressure and depth of water in the reservoirs to be maintained, it shall forfeit all claims for payment for the

month during which such failure occurs; and if such failure
138 shall continue for more than three days after written notice by the city, then the said company shall pay a further forfeit of five hundred dollars per day, which said forfeit shall be paid before said company shall receive any further payment from the said city in pursuance of the provisions of this ordinance. This provision, however, shall not apply to cases where the failure occurs through accidents, as provided in this ordinance.

SEC. 22. In the use of water under this ordinance for the purpose of flushing sewers, said Helena Consolidated Water Company shall furnish water for such number of flushing tanks as said city council may from time to time require, but said flushing tanks shall be so set and regulated that the same will dump or discharge themselves but twice in every twenty-four hours.

SEC. 23. Nothing contained in this ordinance shall in any manner interfere with or curtail the rights of the said Helena Consolidated Water Company to prosecute any action or maintain any claim it may have against any person or persons, corporation or corporations, which shall break, injure or destroy any hydrants or other property belonging to said company, including such damage or compensation as said company may be entitled to by reason of the loss or want of water occasioned by such break, injury or destruction of the said hydrants.

SEC. 24. Said Helena Consolidated Water Company, or its successors or assigns, may have the right, and they are hereby given the privilege of making such reasonable rules and regulations as
139 may be necessary for the purpose of carrying on the business of furnishing water, under the provisions of this ordinance, and for the purpose of making personal examination of the premises of an applicant for water, and of designating rates as herein established, and for the purpose of acquiring the right of access at all reasonable hours to all premises supplied with water for the purpose of designating the rates, and ascertaining whether or not such customer is wasting the water within the meaning of this ordinance; all of which rules and regulations shall be such as are authorized by law, and shall be binding upon the persons or corporations connecting with the works of said company, or taking water from the mains of said company.

SEC. 25. Within thirty days after the passage of this ordinance, the said Helena Consolidated Water Company shall file with the clerk of said city an acceptance in writing for itself and for its successors and assigns, of all the terms, conditions and provisions of this ordinance, and a bond in the penal sum of fifty thousand dollars, with two or more sufficient sureties, to be approved by the mayor, conditioned that if the said company shall receive the sums of money hereby agreed to be paid to it for the term of two years, upon its compliance with the conditions herein set forth, it will indemnify and save harmless the said city from any and all damages, costs, expenses, or liability therefor of whatsoever character, and to whomsoever the same may be due, or become created by, or in any manner

arising from ordinance No. 93, approved November 22d, 1886, or ordinance No. 95, approved February 13th, 1887. And this ordi-
140 nance shall have no force or effect whatever except upon the filing of said acceptance and bond as herein provided; and also a relinquishment by George F. Woolston, and the Helena Water Company, of Salem, Ohio, from all claims against said city to the date of this contract, arising from the ordinances in the section mentioned.

SEC. 26. It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company, during the terms of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure, wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed.

Approved January 15, 1890.

EXHIBIT "C."

Report of the Majority.

Plans and specifications for a water system outlined for the guidance of bidders.

Pursuant to the advertised notice to bidders, the City of Helena will receive bids for a complete water system, together with a supply of water through the same for the said city, which system and supply shall conform to and come within the following specifications and requirements in so far as relates to an entirely new system and supply.

The supply of water to be furnished and for which the bid-
141 der will be required to bid shall not be less than 6,000,000 gallons for each 24 hours and as much more as the bidder may be able and willing to supply.

The geographical location of the proposed source of supply will be accurately described by the bidder, and be represented by maps and plats, and if any proposed supply is capable of an increase in volume the bidder will submit with his bid a detailed description and plan by means of which the supply may be increased, and the cost of such increase. The estimates of the volume of all sources of supply will be based upon extreme low water measurement, and the city council will reserve the right at all times of making a physical test of the amount of water which is proposed to be supplied, before finally accepting any plant which may be purchased.

Bidders will furnish for the consideration of the council such abstract or abstracts of title, or other evidence of ownership, rights and privileges pertaining to their respective propositions, as will

enable the said council to thoroughly investigate and determine the right of the bidder to convey.

The quality of water of the proposed supplied shall be pure and wholesome, and free from contaminating influences as far as possible, and the city reserves the right to make such chemical analysis thereof in order to determine its purity and wholesomeness before accepting the plant.

The minimum pressure required will be 50 pounds per square inch in all portions of the city, and the arrangement of the system shall be such that the above minimum pressure of 50 pounds to the square inch shall be maintained throughout a period of 48
142 hours where a minimum of 10 one-inch fire nozzles are discharging for a continuous period of 48 hours, the normal consumption by consumers not being interfered with.

The city reserves the right, before accepting the plant, to make a physical test of the pressure, and will not be restricted as to the place or places at which test nozzles are applied, nor will the city be restricted to a theoretical exhibit of pressure.

The city reserves the right, to make at least three such tests of pressure as above described, at such times as may be to the city's interest, before accepting the pressure capacity of any proposed system, and the city will agree to make such tests within a period not exceeding 60 days after the time of making the first test, and in case any of the foregoing tests do not meet the requirements of these specifications the city will not accept the proposed plant until such requirements are complied with.

Preference will be given to systems in which the supply mains to the distributing system are built of steel or cast iron.

All supply mains will be protected from the action of frost by imbedding in the earth, or such other means as will insure the pipes against freezing. The designs of pipes will be specially investigated as to their durability and ability to withstand the action of the water, and economy and safety always considered.

The distributing system will be preferable of cast iron, and of such design as to give all of the present inhabitants of the city opportunity to tap the mains and secure a supply of water.

143 The size of mains in the distributing system shall in no instance be less than four inches in diameter, and of such larger sizes as the bidder may deem necessary to properly distribute the supply and maintain the pressure as hereinbefore provided, and in determining the size of pipes to be used due regard shall be *had — the* mains to meet the requirements of the future growth of the city and increased demand for water, with the least possible impairment of the efficiency of the plant as originally installed, both as to ability to furnish all of the inhabitants of the city with water through such mains, and the maintenance of pressure as hereinbefore provided.

The size of mains, other than as hereinbefore stated, will not be specified by the city, but intending bidders will submit their own plans and specifications for the same in conformity with the re-

quirements herein cited, and such bidders will be required to furnish their own elevations or accept such map or maps as the city may have in its possession, the accuracy of which the city will not be responsible for, it being the intention and desire of the city that in the preparation of these specifications by the bidder, that the pressure and volume of water shall gauge the dimensions of the pipes in the different parts of the city, as also the effect which future extensions and increased demands for water by reason thereof, will have upon the same, having in view at all times the proper distribution of water throughout the entire city, and the maintenance of pressure as hereinabove recited.

144 Hydrants to the number of not less than 200 will be required to be at such point or points along the said distributing system as the city council may hereafter direct, the bidder will specify the price per hydrant that will be charged the city, should the city desire to increase the number of hydrants as above stated.

The design of hydrant will not be specified by the city, but the bidders are required to submit detailed plans of the hydrant proposed to be placed by them, together with full description of the merits of the same as regards economy, durability and safety from pressure and freezing.

All valves and specials shall be of the best modern design and shall be easily accessible; bidders shall submit their proposals, complete plans and specifications containing a detailed description of all the parts of the proposed system, such exhibit to be absolutely full and explicit, in order that the city council may estimate and determine the value of what is proposed to be furnished. This requirement will apply to any and all bids that are made, both as to any bid that may be made by the owner of any existing plant in the city and as to any bids that may be made by bidders offering a new system.

To bidders offering a new system, it is to be distinctly understood that the price submitted shall cover the entire expense of the new system, as the city will not enter into any contract for the furnishing of any supply of water, or any system of waterworks, wherein the city may be called upon to pay for any extra whatsoever.

145 The plans submitted shall be executed in such detail as will enable the city to submit them to a competent engineer for examination and advice before action is taken upon the same by the city.

All mains and pipes in the distributing system shall be laid at the depth of five feet below the established grade of the respective streets; and all of the work of excavating for and covering of the pipes shall be under the supervision of the street commissioner of the city of Helena, acting under advice from the city council.

In no case shall said mains or pipes in any manner interfere with any pipes or mains laid in said streets so as to injure or obstruct the same, nor shall said mains or pipes interfere or obstruct any sewer now existing in said streets; and at all places and points in the said

city where mains or pipes approach gas mains or pipes there shall be at least six inches of earth between them. The works herein provided for shall be so constructed as to interfere as little as possible with the rights of others, and any damages resulting in and about the construction of the said plant shall be paid by the contractor, and the city shall be in no manner liable therefor.

All materials furnished by the successful bidder shall be the best of their respective kinds, and all work shall be done in a good and workmanlike manner, all with a view to permanency and durability.

Said system of waterworks to be completed and ready for acceptance by the city on or before the 1st day of July, A. D. 1897.

The successful bidder will be required to furnish a good and sufficient bond upon the letting of the contract, in an amount equal to 15 per cent. of the aggregate of amount of his bid, to be approved by the city council of the said city, as a guaranty that he will
146 well and truly carry out and perform the provisions of his contract, and said contractor will also be required to furnish a guaranty as to the durability and efficiency of said plant, covering a period of 15 years from and after the completion and acceptance of the same by the city. The mayor and committee of the city council of the city, or any officer or other person authorized by said city council, shall at all times have access to the entire works and system herein contemplated, for the purpose of inspecting, examining or testing the same, or any part thereof, until the same shall be finally turned over and accepted by the city.

In case a contract shall be awarded, the said council of said city, in the ordinance providing for said contract, may add such other safeguards and provisions for the protection of said city and its inhabitants, and for the regulation, conduct and management of said work, as to the said city council may seem for the best interests of the said city and its inhabitants.

The city council, believing that the best results can be obtained for the city where all the factors which enter into the construction of a water system are placed in competition, will not specify any particular source of supply, or any particular design or apparatus. Bidders will be expected to make such selections as will in their judgment give to the city the best practical results, wherein safety and economy in maintenance and ample capacity of pure and wholesome water are first considered, and economy in first cost of construction being at all times taken into consideration.

147 It is expressly understood that nothing herein contained shall prevent any company now operating a water plant in the city, or any other company or individual, from submitting a bid for the sale of any plant now constructed, or one proposed to be constructed, upon a plan different than that herein specified, but any such company or individual may submit any bid that it or he may desire upon any other basis, and any and all such bids will be considered by the council in connection with any and all other bids received.

The city council will be pleased to have bidders submit plans in

triplicate, if possible, as it is the desire and intention of the said council to give full publicity to the various exhibits, in order that a thorough discussion and understanding may be had, as far as practicable, with the taxpayers, before final action is taken.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

I hereby certify that the foregoing is a full, true, correct and compared copy of the original complaint, notice of appeal, order, and injunction in cause No. 3,465, Helena Consolidated Water Co. *vs.* Wm. L. Steele, mayor of city of Helena, *et al.*, as the same appears to me of record.

In witness whereof, I have hereunto set my hand and affixed the official seal of this court, this 19th day of August, 1902.

[SEAL.] FINLAY McRAE, *Clerk*,
By WILLIAM T. CONDON,
Deputy Clerk.

148 In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke.

THE STATE OF MONTANA on the Relation of THE CITY OF HELENA }
vs.
THE HELENA CONSOLIDATED WATER COMPANY. }

Affidavit of Stephen Carpenter.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

Stephen Carpenter, being first duly sworn, deposes and says:

1.

That he is the duly appointed, qualified and acting city clerk and attorney of the said relator, the said City of Helena, and makes this affidavit, and brings this proceeding, for and on behalf of said City of Helena, by authority of an order duly made by the city council of said city of Helena.

2.

That during all the time mentioned in this affidavit the said city of Helena is and was a municipal corporation duly organized and existing under and by authority of the laws of the State of Montana, with certain powers, among which is the power "to
149 provide said city with water, erect hydrants and pumps, build cisterns and dig wells in the streets for the supply of engines and buckets; to provide for the prevention and extinguishment of fires; and to make regulations to secure the general health of the inhabitants."

3.

That it is the duty of the said city, under the said laws, to provide and maintain a system of sewerage for said city and the inhabitants thereof, and to extinguish fires within its limits; and that it is necessary for said city to have a supply and pressure of water at all times adequate for these and other purposes, that it may protect the property of said city, and the lives, property and health of the inhabitants thereof, as is of it by the said laws required.

4.

That the said Helena Consolidated Water Company is, and during all the times mentioned in this affidavit was, a corporation duly organized and existing under and by virtue of the laws of the State of Montana, for the purpose, among other things, of supplying the said city of Helena, and the inhabitants thereof, with water.

5.

That the said Helena Consolidated Water Company has had, for the past five years, and now has, a sufficient supply and pressure of water and water pipes, mains and hydrants laid and placed in the said city of Helena and its streets, and now is in a position to, and is able to, furnish a sufficient supply and pressure of water to said city of Helena for fire, sewerage and other purposes.

150 6.

That for the past five years the said Helena Consolidated Water Company has supplied the said City of Helena and its inhabitants with water under and by authority of a certain ordinance of said city of Helena duly passed and in force and numbered 248, which said ordinance is attached hereto and made a part hereof and marked Exhibit "A;" which said ordinance and all its terms, conditions and provisions were within the time therein prescribed duly accepted by said Helena Consolidated Water Company, and its bond duly filed.

7.

That by virtue of said ordinance No. 248, the said Helena Consolidated Water Company has, since the 20th day of January, 1890, and until the 20th day of January, 1895, supplied the said city of Helena with water for fire, sewerage, and other purposes, as provided in said ordinance.

8.

That heretofore, and before the said 20th day of January, 1895, the city of Helena duly advertised for bids for supplying the said city of Helena with water for fire, sewerage and other purposes, from and after that date.

9.

That in accordance with said advertisement said bids were opened by said city on the 8th day of January, 1895, when it appeared that only one bid had been made, which said bid was made by the said Helena Consolidated Water Company, which said bid is hereto attached and made a part hereof and marked Exhibit "B."

151

10.

That the city council of the said city of Helena duly rejected said bid on said 8th day of January, A. D. 1895, for the reason that the same was unreasonable and excessive.

11.

That after the said 20th day of January, 1895, and before the commencement of this proceeding, the said City of Helena duly demanded of said Helena Consolidated Water Company that it furnish a sufficient supply of water to said city of Helena for fire, sewerage and other purposes.

12.

That the said City of Helena is ready, willing and able to pay the said Helena Consolidated Water Company the reasonable value of such water, and that after said demand, and before the commencement of this proceeding, it duly tendered to the said Helena Water Company the sum of $85 for five days' supply of water for the purposes mentioned herein, which sum and rate the said City of Helena, on information and belief, avers to be reasonable, and thereupon demanded that it furnish to said city water adequate for such purposes for said period of five days, but that the said Helena Consolidated Water Company refused, and still refuses, to supply the water so demanded, or to furnish water to the said city of Helena at a less rate than in the said bid herein referred to, and unless bids for a supply of such water are duly advertised for, and a contract duly entered into with said city in accordance with said advertisement.

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13.

That prior to the time of the passage of the said ordinance, various companies and private parties owned water rights available to supply the said city of Helena and the inhabitants thereof with water, and had been so supplying them through mains laid in the streets of the said city, under franchises by it granted; but that, immediately prior to the passage of the said ordinance the said Helena Consolidated Water Company had become the owner, by purchase or otherwise, of all of the said water rights and franchises, and of all water rights or water available or adequate to supply the needs of the said city or the inhabitants thereof, all of which facts were known to the said city council and the mayor of said city at the time of the passage of the said ordinance.

14.

That the said Helena consolidated Water Company is and has ever since remained the only company or person having any franchise which will enable it or him to supply the said city or the inhabitants thereof with water, and is the only source from which water can be obtained to supply said city of Helena with a sufficient supply and pressure of water for fire, sewerage and other purposes; and affiant avers, upon information and belief, that it would take at least from one to two years to construct works adequate to conduct to and supply said city of Helena with a sufficient quantity and pressure of water for the purposes herein mentioned.

15.

That the said city of Helena is solvent and able to pay for
153 all water furnished for said purposes to said city.

16.

That the usual manner of doing business by the said City of Helena, and other municipal corporations, is to pay for labor or materials after it is performed or furnished and not in advance.

17.

That the said City of Helena has no plain, speedy, or adequate remedy in the ordinary course of law and said city will suffer irreparable damage unless a writ of mandate is allowed.

Wherefore, affiant prays that a peremptory writ of mandate issue out of this honorable court, directed to said Helena Consolidated Water Company, its officers, agents and employees, commanding it to furnish a sufficient supply and pressure of water to said city of Helena for fire, sewerage and other purposes, and for such other and further relief as may seem proper and right.

(Signed) STEPHEN CARPENTER.

Subscribed and sworn to before me this 31st day of January, 1895.

CHARLES F. ELLIS,
Notary Public.

STEPHEN CARPENTER AND
T. J. WALSH,
Attorneys for Relator.

154 EXHIBIT "A."

Ordinance No. 248.

To provide the city of Helena and its inhabitants with a permanent water supply.

Whereas, the city council of the city of Helena did advertise in the "Helena Herald," the "Helena Journal," and the "Helena Independent" for a period of forty days, to-wit, from the 13th day of

June 1889, to the 1st day of August, 1899, with specifications, for proposals for a water supply for the use of said city and the inhabitants thereof, and,

Whereas, it was found and determined, upon an examination of the several proposals received in response to such advertisement, and after due consideration thereof, that George F. Woolston was the lowest responsible bidder therefor; and,

Whereas, the Helena Consolidated Water Company is the assignee and successor of the said George F. Woolston; and,

Whereas, the city council of the said city of Helena has awarded the said contract to the said Helena Consolidated Water Company as such assignee and successor:

Now, therefore, be it ordained by the city council of the city of Helena:

SECTION 1. There is hereby granted to the Helena Consolidated Water Company and its successors and assigns, for the full term of twenty years from the passage hereof, the license and franchise of laying and maintaining water mains and pipes in and through
155 all of the streets, alleys, avenues and public grounds of the city of Helena for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies or corporations within the said city desiring to purchase the same, and to said city for fire, sewerage, and other purposes, in case said city desires to purchase the same, subject, however, to the provisions of this ordinance hereinafter contained, establishing maximum rates, and generally to have and exercise all the rights, privileges and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city if required. Provided, however, that nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Company, or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys and public grounds of said city with water mains and pipes, or the exclusive right — conveying, distributing, or selling the same throughout the said city, or of furnishing the same to said city, except as hereinafter set forth.

SEC. 2. For the purpose of laying, repairing, keeping and maintaining such water mains and pipes, there is hereby granted to said Helena Consolidated Water Company, and to its successors and assigns, the right and privilege of digging ditches and making excavations in and upon any and all streets, avenues, alleys, public grounds and thoroughfares of the city. Provided, that it or they shall, without unreasonable delay, restore the same to as
156 good condition as they were before the said excavations were made, and remove all earth, sand, rubbish and other material.

SEC. 3. All pipes and mains, including the service pipes connected therewith, shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location of streets; and all repairs and extensions of such pipes and mains shall be done

under the supervision of said street commissioner as to grade and location in streets. Nothing contained herein shall preclude said city of Helena from regrading or rechanging the grade of any street or streets within said city, or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting, giving or granting any franchises, rights or easements to any person or persons, corporation or corporations whomsoever, so long as such franchises, rights and easements do not interfere with the franchises, rights and easements hereby granted. And that said Helena Consolidated Water Company must and shall look solely and exclusively to the person or persons, corporation or corporations to whom such franchises, rights or easements have been given by said city for any and all damages the said Helena Consolidated Water Company may sustain by reason of any interference with its pipes, mains or hydrants, or any exposure of the same caused by such person or persons, corporation or corporations.

SEC. 4. The works hereby contemplated shall be so constructed and maintained as to interfere as little as possible with the
157 property of others; and any damage resulting from said erection, construction and operation thereof, shall be repaired and paid for by the said Helena Consolidated Water Company, or its successors or assigns.

SEC. 5. It is hereby provided that in no case shall the mains and pipes — be laid and maintained under the provisions of this ordinance, in any manner interfere with any mains or pipes legally laid in said streets so as to injure or obstruct the use thereof, nor shall such pipes or mains interfere or obstruct any sewer now in said streets, nor shall there be any interference with mains, pipes or sewers which may be hereafter authorized to be laid or constructed by or under the authority of said city of Helena by mains hereafter laid by the said Helena Consolidated Water Company, or its successors or assigns, and at all places and points in the said city where said mains and pipes approach gas main- or pipes there shall be at least six inches of earth between the same.

SEC. 6. The said Helena Consolidated Water Company shall furnish and provide a full, ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction), and for other purposes; and such supply shall be full, ample and sufficient for the present population of the said city, and for the future population of the said city as the same may be from time to time during the full term of five
158 years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render if unhealthy or unfit for domestic use.

SEC. 7. The pressure in pipes and mains at the level of the first floor of the courthouse of Lewis and Clarke county, in said city, and at all other points of equal height, shall be maintained at not less than sixty pounds to the square inch if reservoir works shall be used; and if the direct pressure system shall be used, sixty pounds

to the square inch fire pressure, and forty pounds to the square inch ordinary pressure shall be maintained at said points, and at all other points of equal height.

SEC. 8. The said Helena Consolidated Water Company shall lay, or provide at its own cost and expense, twenty miles of mains within the limits of said city, exclusive of the amount of mains connecting the works of said company with the point or points of distribution, and such mains shall be of the following sizes, and on the following streets in the said city of Helena, respectively: At least ten inches in inner diameter, on Lawrence street from Benton avenue to Main street; on Rodney street from Broadway to Helena avenue; on Main street from Bridge street to Helena avenue; on Helena avenue from Main street to the right of way of the Northern Pacific Railroad Company; on Broadway from Main street to Rodney street. At least eight inches in inner diameter on Madison avenue from Lawrence street to Davis street in the Hauser addition; on Lawrence from Madison avenue to Benton avenue; on Rodney street from Bridge street to Broadway; on Fifth avenue from
159 Warren street to Hoback street; on Ninth avenue from Rodney street to Idaho avenue. At least five inches in inner diameter on Benton avenue from Edwards to Lyndale avenue; on Clore street from Bridge street to Benton avenue at Flowerree street; on Lawrence street from Madison avenue to the western boundary of the city; on Clark street from Strawberry street to Clore street; on Howey street from Adams street to Clark street; on Jefferson street from Adams to Ming street; on Ming street from Jefferson street to Howey street; on Bridge street from Clore street to Chaucer street; on west Main street from Bridge street south 1,050 feet; on Rodney street from Bridge street south 1,250 feet; on Wood street from Main street to Ewing street; on Ewing street from Fifth avenue to Helena avenue; on Jackson street from Wood street to Sixth avenue; on Sixth avenue from Jackson street to Main street; on Broadway from Rodney street to Beattie street; on Fifth avenue from Hoback street to Tietjen street; on Gallatin street from Helena avenue to Fifth avenue; on Lyndale avenue from Benton avenue to Helena avenue; on Third street Northern Pacific addition, from Helena avenue north five hundred feet; on Grand street from Jackson street to Warren street; on Warren street from Broadway to Helena avenue; on Hemlock street from Madison avenue to Harrison avenue; on Chaucer street from Bridge street to Broadway. At least four inches in inner diameter, on Dearborn street from Lawrence street to Davis street in Hauser addition; on Cutler street from West Main to Rodney street on Pine street from Joliet
160 street to Rodney street; on Water street from Cutler street south four hundred and thirty feet; on Breckenridge street to Beattie street; on Eighth avenue from Eighth avenue to Hoback street; on Hobock street to Eleventh avenue from Rodney street to Hoback street; from Eleventh avenue to Pflaumie street. At least three inches in inner diameter on Davis street in Hauser addition from Madison avenue to Benton avenue; on Strawberry street from

Clark street to Lawrence; on Adams street from Howey street to Jefferson street; on Davis street from Broadway to Fifth avenue; on Hoback street from Fifth avenue to Eleventh avenue.

In making up the said twenty miles of mains the said Helena Consolidated Water Company may put in and shall be allowed for any pipes or mains now laid in any of the streets of the city of Helena, and owned by the said water company, not counting, however, more than one main or pipe upon the same portion of any street, and in addition to such mains and pipes as are now laid, and which may be used under the provisions of this ordinance, the said Helena Consolidated Water Company shall lay such other mains, of such sizes, on such other streets as may be ordered by the said city council of the said city so as to make its full complement of mains within said city twenty miles.

SEC. 9. The said Helena Consolidated Water Company shall place down and connect with the twenty miles of mains herein provided for, at points to be designated by the city council, or a committee thereof, two hundred hydrants, and shall maintain said
161 hydrants during the continuance of this contract. Said hydrants shall have double nozzles and shall be nonfreezing and of the latest and most improved pattern, and all connections of such hydrants with the mains shall be of not less than four inches in diameter. Provided, that if the contractor use any system of pipes and hydrants now in said city, and formerly belonging to the Helena Water Company, such hydrants need not be changed or removed, and said council shall not change or relocate the same, but said hydrants shall be considered as having been located by the said city council or committee thereof under the provisions of this ordinance. The location of mains and hydrants to complete the twenty miles of mains, and the two hundred hydrants provided for in this ordinance, shall be made by the city council when the said water company is ready to erect the same without delay or loss to the said water company.

SEC. 10. The said Helena Consolidated Water Company shall lay and maintain, in addition to the twenty miles of mains hereinbefore specified, such mains, of such sizes, at such times, and upon such streets as the city council from time to time shall direct, which said work shall be commenced and prosecuted to completion with diligence, and without unreasonable delay, and shall place and maintain one hydrant for each one-tenth of a mile on such additional mains, if the same shall be of the diameter of six inches or more, or if the same shall be of a diameter of less than six inches, then one hydrant for each one-seventh of a mile; said hy-
162 drants to be of the pattern above specified; no hydrant to be placed on any pipe of less than four inches in diameter.

SEC. 11. All water which may be required by said city of Helena for the use of any and all buildings owned and occupied by said city for municipal purposes, and also all water necessary for street sprinkling purposes in said city, shall be furnished by the said Helena Consolidated Water Company without cost or charge to said

city. Provided, however, that in case the said city shall hereafter desire to use any water for street sprinkling purposes, the same must be taken from the mains of the said Helena Consolidated Water Company by means of stand pipes erected at the cost and expense of said city, at such point or points as may be necessary upon the lines of mains of said company, and that said city shall not have the right to use any of the hydrants of the said company for the purpose of obtaining water for street sprinkling purposes.

SEC. 12. In case of unavoidable accident or breakage of machinery, due time shall be given to the said Helena Consolidated Water Company to repair the damages, but it shall receive no pay from any person or corporation for any time during which it fails to furnish water for the causes in this section stated.

SEC. 13. The works hereinbefore provided for, and the water system connected therewith, shall be completed and in readiness for the conveyance and distribution of water throughout the
163 twenty miles of mains hereinbefore provided for, on or before the first day of July, 1890.

SEC. 14. The mayor and any committee of said council of said city, or any officer or person authorized by said city council, shall at all times have free access to the entire works and system of the said Helena Consolidated Water Company, for the purpose of inspecting and examining, or testing the same, or any part or portion thereof.

SEC. 15. The said Helena Consolidated Water Company shall, from and after the 20th day of January, 1890, until said system is completed, in accordance with the terms of this contract furnish the said city of Helena with water for fire, sewerage and other purposes, through the hydrants, included in the contract between the said city of Helena and the Helena Water Company, and the hydrants on such extensions as have been or may be ordered by the city council of said city at the price herein provided for; but it shall not be required to complete its system for the conveyance and distribution of water through the twenty miles of mains herein provided for, before the 1st day of July, 1890.

SEC. 16. The charges for water furnished by the said Helena Consolidated Water Company to any persons, bodies, or corporations in this city, shall not exceed the following rates; for private houses, one dollar per month; for each private bathtub, thirty-three cents per month; for each private wash basin, twenty-five cents per month; for each private water-closet, thirty-three cents per
164 month; for each private urinal, thirty-three cents per month; for irrigating lawns, gardens and grounds, where other water is taken, one dollar and twenty-five cents per month, for each fifty feet fronting on the street; when no other water is taken, one dollar and fifty cents per month. When revolving fountains and sprinklers are used an extra price may be charged, which shall not exceed twenty-five per cent. in addition to the rate of irrigation above prescribed; provided, there shall not be more than one nozzle or sprinkler for each fifty feet of frontage at the rates specified in this

section. All charges for irrigation shall be limited to the months of May, June, July, August, September and October. And in case any person or persons, corporation or corporations, or company shall use water for irrigation purposes at any other time than during the months herein mentioned, such person or persons, corporation or corporations, or company, shall pay to the said contractor, or its successors or assigns, for the use of such water, for the time so used, upon the same terms per month as above stated. Where meters are used the charge shall not exceed the following rates, viz., for one thousand gallons per day or less, four cents per one hundred gallons; for one thousand to four thousand gallons per day, three cents per one hundred gallons; for four thousand gallons per day or more, two cents per one hundred gallons. When said water company believes that water is being wasted or unnecessarily used, it may place a meter on the service pipe communicating with the said premises, but if it is found that such consumer is not using over thirty-three per cent. more water than the monthly rate
165 would pay for, according to the meter rates herein prescribed, the said water company shall only be allowed to collect the monthly rate herein provided. If the said consumer is using over thirty-three per cent. more than the monthly rate would pay for, then the said water company may collect meter rates as herein specified.

SEC. 17. The said Helena Consolidated Water Company shall make no charge for tapping mains for the connection of service pipes herewith, except the actual cost of labor and materials required, and in no case to exceed two dollars and fifty cents for four inch mains, three dollars for six inch mains, three dollars and fifty cents for eight inch mains, four dollars for ten inch mains, and four dollars and fifty cents for twelve inch mains. Such connection shall be made at the cost of the applicant by any plumber whom he may employ, but not, however, until such applicant shall have procured a permit for such connection from the said Helena Consolidated Water Company. Provided, always, that said company shall not refuse to permit connections to be made by, or to sell, or deliver water to any persons who shall offer to pay for the same, and shall comply with the provisions of this ordinance, and with such regulations as may be from time to time prescribed by the city council of said city, and the reasonable rules and regulations of said company.

SEC. 18. The said Helena Consolidated Water Company shall have the right to put in a stopcock on each service pipe below the sidewalk near the curb, at its own proper cost and expense, and shall box the same securely, and place the cover flush with
166 the sidewalk, and may turn off the water from any premises when the water rates are not paid, within fifteen days after the same shall have become due, and when said consumer has failed to comply with any reasonable rule or regulation of said company; bu- the said company shall not place any self-closing faucet or water bib upon any service pipe without the consent of the owner thereof.

SEC. 19. No person or persons, excepting the mayor and fire marshal, and those acting under their authority, or the authority of the said city council, and the agents and employees of said water company, shall meddle with *with*, or use any of the hydrants provided for in this ordinance, and any person violating this provision shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not less than five dollars nor more than fifty dollars. Said hydrants shall only be used for fire and sewerage purposes.

SEC. 20. From and after the 20th day of January, 1890, the said Helena Consolidated Water Company shall keep and maintain in the storage reservoir formerly belonging to the Helena Water Company, and commonly known as the "Woolston reservoir" or in the reservoir formerly belonging to Helena Water Company, and commonly known as the "Hale reservoir," a depth of not less than six feet of water, and after the first day of July, 1890, shall keep and maintain in both of said reservoirs a depth of not less than six feet of water.

SEC. 21. There is hereby appropriate[illegible]t of the yearly revenues of the said city of Helena, for the use and benefit of the said Helena Consolidated Water Company, its successors or assigns, during
167 the full term of five years from and after the 20th day of January, 1890, the following sum of money, to wit: Out of the general fund of said city the sum of twenty dollars per year for each hydrant required by this ordinance to be kept and maintained by the said Helena Consolidated Water Company, on the twenty miles of mains provided for in this ordinance, and for the use of the water, through said hydrants by said city for the purpose of sewerage, and the sum of sixteen dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purposes. Out of the fire department fund of said city the sum of eighty dollars per year for each hydrant required by this ordinance, to be kept and maintained by said Helena Consolidated Water Company, on the said twenty miles of mains provided for in this ordinance, and for the use of the water through the said hydrants by said city for the purpose of extinguishing fires and for the fire department; and the sum of fifty-eight dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purpose. And it is hereby made the duty of said city council during the said term of five years to levy annual taxes under the provisions of the charter of said city, authorizing the levy of taxes for general purposes, and for fire department purposes sufficient in amount to provide funds to meet the appropriations hereby made. For the purpose of carrying out the provisions of this section, the mayor and city clerk are hereby authorized, upon allowance by the city council to draw warrants on the above
168 funds for the above amounts, and to pay the same unto the said Helena Consolidated Water Company, its successors or assigns, at the end of each month. Provided, however, that if the said company shall fail to comply with the requirements herein

contained concerning the pressure and depth of water in the reservoirs to be maintained, it shall forfeit all claims for payment for the month during which such failure occurs; and if such failure shall continue for more than three days after written notice by the city, then the said company shall pay a further forfeit of five hundred dollars per day, which said forfeit shall be paid before said company shall receive any further payment from the said city in pursuance of the provisions of this ordinance. This provision, however, shall not apply to cases where the failure occurs through accidents, as provided in this ordinance.

SEC. 22. In the use of water under this ordinance for the purpose of flushing sewers, said Helena Consolidated Water Company shall furnish water for such number of flushing tanks as said city council may from time to time require but said flushing tanks shall be so set and regulated that the same will dump or discharge themselves but twice in every twenty-four hours.

SEC. 23. Nothing contained in this ordinance shall in any manner interfere with or curtail the rights of the said Helena Consolidated Water Company to prosecute any action, or maintain any claim it may have against any person or persons, corporation or corporations, which shall break, injure or destroy any hydrants or other property belonging to said company, including such
169 damage or compensation as said company may be entitled to by reason of the loss or want of water occasioned by such break, injury or destruction of the said hydrants.

SEC. 24. Said Helena Consolidated Water Company, or its successors or assigns, may have the right, and they are hereby given the privilege of making such reasonable rules and regulations as may be necessary for the purpose of carrying on the business of furnishing water, under the provisions of this ordinance, and for the purpose of making personal examination of the premises of an applicant for water, and of designating rates as herein established, and for the purpose of acquiring the right of access at all reasonable hours to all premises supplied with water for the purpose of designating the rates, and ascertaining whether or not such customer is wasting the water within the meaning of this ordinance; all of which rules and regulations shall be such as are authorized by law, and shall be binding upon the persons or corporations connecting with the works of said company, or taking water from the mains of said company.

SEC. 25. Within thirty days after the passage of this ordinance, the said Helena Consolidated Water Company shall file with the clerk of said city an acceptance in writing, for itself and for its successors and assigns, of all the terms, conditions and provisions of this ordinance, and a bond in the penal sum of fifty thousand dollars, with two or more sufficient sureties, to be approved by the mayor, conditioned that if the said company shall receive the sums of money herein agreed to be paid to it for the term of two
170 years, upon its compliance with the conditions herein set forth, it will indemnify and save harmless the said city from

any and all damages, costs, expenses or liability therefor of whatsoever character, and to whomsoever the same may be due, or become created by, or in any manner arising from ordinance No. 93, approved November 22d, 1886, or ordinance No. 95, approved February 13th, 1887. And this ordinance shall have no effect or force whatever except upon the filing of said acceptance and bond as herein provided; and also a relinquishment by George F. Woolston, and the Helena Water Company of Salem, Ohio, from all claims against said city to the date of this contract arising from the ordinances in the section mentioned.

SEC. 26. It is hereby declared and understood to be the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the terms of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed.

Approved January 15th, 1890.

EXHIBIT "B."

To the honorable mayor and city council of the city of Helena, Montana.

GENTLEMEN: In response to the advertisement of the city clerk for proposals to furnish water to the city of Helena, and its inhabitants, the Helena Consolidated Water Company submits the following proposition:

171 To furnish an ample supply of good water upon the same basis and terms as provided in the contract between said water company and said city, now about to terminate, with the following exceptions:

I. That said contract shall be for a period of ten years.

II. That the company shall receive ninety dollars ($90) per year each, for two hundred and sixty-five (265) hydrants, as now located, or as may hereafter be located by the city; and sixty dollars ($60) per year each, for all hydrants which may hereafter be erected and furnished on extensions hereafter ordered by the city council.

III. No extensions shall be ordered for less than a six (6) inch main.

IV. The company shall furnish a pressure for fire purposes of at least sixty (60) pounds to the square inch at the ground floor of the county courthouse in said city, and at all points of equal height in said city; and shall furnish such pressure at all times on all mains as may be requisite and necessary to give an ample supply of water for all other purposes.

This proposal is subject to such modifications as to detail as may be agreed upon by this company and your honorable body.

If the city desires to purchase the plant of this company, the com-

pany hereby proposes to sell and convey unto said city its entire plant for the exact amount of the investment of said company in said plant to this date.

The required bond accompanies this proposal.

172 Dated Helena, Montana, January 8th, 1895.

HELENA CONSOLIDATED
WATER COMPANY,
By WM. A. CHESSMAN, *President.*

Attest:

[Seal of said Company.]

JNO. B. CLAYBERG, *Secretary.*

STEPHEN CARPENTER,
T. J. WALSH,
Attorneys for Relator.

Pleading filed Jan. 31, 1895.

JOHN BEAN, *Clerk.*

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA on the Relation of THE CITY OF HELENA
vs.
THE HELENA CONSOLIDATED WATER COMPANY.

Order for Issuance of Writ of Mandate.

On reading and filing the affidavit of Stephen Carpenter, city clerk and attorney of the city of Helena, it is this 31st day of January, 1895, hereby ordered that an alternative writ of mandate issue herein commanding the said Helena Consolidated Water Company to forthwith *to* furnish a sufficient supply and pressure of water to the city of Helena for fire, sewerage and other purposes, or that it ap-

173 pear before this court on Tuesday the 5th day of February, 1895, then and there to show cause why it has not done so.

By the court:

HORACE R. BUCK, *Judge.*

January 31st, 1895.

Filed January 31, 1895.

JOHN BEAN, *Clerk,*
By G. O. FREEMAN, *D. C.*

COUNTY OF LEWIS AND CLARKE,
State of Montana.

OFFICE OF THE SHERIFF.

I hereby certify that I received the annexed writ of mandate and affidavit on the 31st day of January, A. D. 1895, and personally

served the same on the 31st day of January, A. D. 1895, upon the Helena Consolidated Water Company, by Wm. A. Chessman, president, for defendant, by delivering to said Wm. A. Chessman, president, for said Helena Consolidated Water Company, personally, in the county of Lewis and Clarke, a copy of said writ of mandate, and affidavit, and a copy of the complaint in said action therein named, at the same time showing him the annexed original writ of mandate and affidavit, and informing him of the contents thereof.

Dated, Helena, January 31st, 1895.

J. H. JURGENS, *Sheriff*,
By C. H. MARTIEN,
Deputy Sheriff.

174	Service	$1.00
	Copy	2.40
	Mileage	.20
	Total	$3.60

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA on the Relation of THE CITY OF Helena
vs.
THE HELENA CONSOLIDATED WATER COMPANY.

Writ of Mandate.

The State of Montana to the Helena Consolidated Water Company:

Whereas it manifestly appears to us by the affidavit of Stephen Carpenter, city clerk and attorney of the city of Helena, the party beneficially interested herein, that the said Helena Consolidated Water Company unjustly and unlawfully refuses to furnish water to the city of Helena, for fire, sewerage, and other purposes, the allegations concerning which are particularly set out in the copy of the said affidavit hereto attached and made a part hereof; and that there is not a plain, adequate and speedy remedy in the ordinary course of the law:

175 Therefore, we do command you that immediately after the receipt of this writ, you supply the said city of Helena with a sufficient quantity and pressure of water for fire, sewerage and other purposes, or that you show cause before this court at the court-room thereof in the city of Helena, Lewis and Clarke county, Montana, at the opening of the court on Tuesday, the 5th day of February, 1895, why you have not done so.

Witness the Honorable Horace R. Buck, judge of said court, and the seal thereof, this 31st day of January, 1895.

[SEAL.] JOHN BEAN, *Clerk*,
By —— ——, *Deputy.*

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA *ex Rel.* THE CITY OF HELENA, Plaintiff,
vs.
THE HELENA CONSOLIDATED WATER COMPANY, Defendant.

Answer.

Now, comes the above-named defendant, The Helena Consolidated Water Company, and for answer to the affidavit and writ of mandate on file herein, says:

176 I.

1. It admits the allegations of paragraphs 1 to 7, inclusive, of the affidavit on file herein.

2. It denies that the said city duly advertised for bids for supplying the city with water for fire, sewerage and other purposes from and after the 20th day of January, 1895, in accordance with the provisions and conditions of the charter of said city, and attaches hereto a copy of the only advertisement made by said city in that behalf, which is marked Exhibit "A" and made a part of this answer.

3. It admits that said city, prior to the commencement of this proceeding, tendered to this company the sum of eighty-five dollars ($85) for five days' supply of water for fire, sewerage and other purposes of said city, and demanded of this defendant that it furnish a sufficient supply of water to said city for said purposes but denies that the amount so tendered was reasonable, and alleges the facts to be as hereinafter in this answer alleged.

4. Admits that this defendant refused, and still refuses, to supply the water so demanded upon the terms and for the prices tendered by the said city, and refuses to furnish water to said city at a less rate than in said bid referred to in said affidavit, and also refuses to furnish water unless bids for a supply of such water are duly advertised for in accordance with the terms and conditions of the charter of said city, and unless a contract is duly entered
177 into between this defendant and said city, for such water, in accordance with such charter and advertisement.

5. Denies that this defendant prior to the passage of the ordinance set forth in said city's affidavit, became the owners of all water rights and franchises, and all water rights and water available or adequate to supply the needs of said city, and the inhabitants thereof.

6. It denies that this defendant is the only source from which water can be obtained to supply said city of Helena, with a sufficient supply of pressure of water for fire, sewerage or other purposes; but it admits that at present it is the only company or person having any franchise which will enable it, or him, to supply said city and the

inhabitants thereof with water, and the only one in condition to immediately begin the delivery of such supply.

7. Denies that its bid set forth in said affidavit was, or is, unreasonable or excessive.

And this defendant, for a further answer to said affidavit and writ, alleges:

1. That it is now, and at all the times hereinafter stated was, a corporation duly organized and existing under and by virtue of the laws of the State of Montana. A true copy of its certificate of incorporation is hereto attached, marked Exhibit "B," and made a part of this answer.

2. That the City of Helena is now, and at all the times hereinafter was, and is, a municipal corporation, duly organized and existing under and by virtue of the laws of the State of Montana.

3. That on the 15th day of January, 1890, the said City of Helena, by its mayor and common council, duly enacted an ordi-
178 nance, which is number 248, and a copy of which is attached to the affidavit of plaintiff on file herein, and reference is hereby made to said affidavit, and the same is hereby made a part of this answer.

4. That this defendant duly accepted the terms and conditions of said ordinance, and both the city and this defendant have acted under the terms and conditions of said ordinance from the date thereof up to and including the 20th day of January, 1895.

5. That under and by virtue of its certificate of incorporation and the terms of said ordinance this defendant became and is now entitled to carry on its business, as set forth in said certificate of incorporation in the city of Helena, and its vicinity, and to furnish water to the inhabitants of said city, at not exceeding the maximum rate fixed by said ordinance, for the period of twenty years from and after the passage of said ordinance; and also to furnish water to said city in case said city desires to purchase the same.

6. That under and by the terms and conditions of said ordinance maximum rates were agreed upon between this defendant and the said city for furnishing the inhabitants of said city with water, but that no maximum or other rates were fixed by said ordinance by defendant's certificate of incorporation, or otherwise, for water to be supplied by said defendant to said city, in case said city desired to purchase the same, except that as a part of said ordinance, a contract was duly entered into between said city and this defendant for the furnishing of water by this defendant to said city for the purposes therein stated, and for the prices therein agreed upon,
179 for the period of five years from and after the 20th day of January, 1890, which contract has now expired.

That since the expiration of said contract, there has been, and now is, no agreement or contract between said city and this defendant, for the furnishing of water to said city for fire, sewerage or other municipal purposes.

7. That it is unreasonable to demand that this defendant furnish

water to the city for municipal purposes from day to day and in violation of its reasonable rules and regulations.

That this defendant has duly adopted a rule and regulation that in all cases, unless qualified by special contract, all consumers are required to pay for water for three months in advance, except where meters are used, in which case consumers are required to pay at the end of each month.

8. That defendant further alleges that it has acquired ample facilities and water to furnish said city with an abundant supply of water for municipal purposes, at an actual expenditure of nearly one and one-half million of dollars; and alleges that it is ready and willing to so furnish the same at such prices as will enable this defendant to maintain and operate its plant, pay all its fixed and other necessary charges, and receive a reasonable compensation for the investment of its stockholders in said plant and property.

9. That this defendant has operated its plant in the most economical manner possible since the organization of this company; that it has paid no excessive salaries or other charges, but that
180 every dollar this company has earned has been properly applied to its plant and the operation thereof. That since the organization of this company, to wit, the 1st day of October, 1889, up to the 1st day of January, 1895, the receipts of this defendant from all sources have been less than its necessary expenditures in the amount of $33,009.58; that its earnings since the 1st day of January, 1890, to the 20th day of January, 1895, have been less than the actual and necessary disbursements of this defendant in and about said plant and the operation thereof; that no dividend of any kind, character or description has ever been paid to any of these stockholders of said company since it commenced its operations.

10. That this defendant has now outstanding $949,000, in mortgage bonds; $709,000 of which bears semi-annual interest at the rate of six per cent. per annum; and $240,000 bears semi-annual interest at the rate of five per cent. per annum; that it has a floating indebtedness of $258,200, upon which it is compelled to pay various rates of interest running from seven to ten per cent. per annum; that the operating expenses, taxes and licenses for the year 1894 have been $18,550.07; that this defendant paid $77,327.24, for interest on its outstanding obligations for the year 1894; that its receipts for the year 1894 from the city under said contract were $24,328.46, and its receipts for said year from all sources were $89,206.37, leaving a deficit in the treasury of the company of $6,770.94.

11. That the present yearly revenues from the inhabitants
181 of the said city at the maximum rates fixed by said ordinance will leave a deficit in the treasury of this defendant of at least $24,000, after this defendant pays all of its fixed charges and operating expenses, and unless it receives a sufficient remuneration from said city to pay this deficit, it cannot operate or carry on its business, and cannot furnish water to said city of Helena, or its inhabitants; that it cannot increase its charges for domestic services

during the next fifteen years without the consent of the city council, because of the provisions of said ordinance relative to maximum charges; that it has no other sources of revenue than from the city and its inhabitants.

12. That under and by virtue of the terms and conditions of its charter from the State of Montana, it is given the power to contract for and sell water to the city of Helena and its inhabitants; that it is willing to sell said water to the said city for municipal purposes at the prices set forth in its bid, a copy of which is attached to plaintiff's affidavit, marked Exhibit "B," to which reference is hereby made, and the same is hereby made a part hereof.

13. It denies that the amount tendered to this defendant by said city is a reasonable amount for the furnishing of water to said city, and alleges that the only reasonable amount for such services and water is at the rate set forth in said defendant's bid, hereinbefore referred to.

That it cannot operate its plant and furnish said water for a smaller rate or sum without sustaining an absolute loss on its business in each and every year.

182 14. It alleges that the said city of Helena has no right to fix or establish any rate of payment for water to be furnished by this defendant to said city for municipal purposes.

15. It alleges that there is no duty devolving upon this defendant to furnish water to said city for municipal purposes, except under a purchase of said water from this defendant by said city. That this defendant is the owner of all the water brought into said city through its pipes, and has good right and lawful authority to sell and furnish the same.

16. That if defendant is compelled to furnish water to the city for municipal purposes at the rate offered by said city, it will result in the taking of defendant's property without due process of law, and without just or adequate compensation being made, paid or provided therefor.

Wherefore, this defendant asks that the proceedings herein be dismissed.

E. W. TOOLE,
McCONNELL, CLAYBERG & GUNN,
Attorneys for Defendant.

STATE OF MONTANA,
County of Lewis and Clarke, } ss:

W. A. Chessman, being first duly sworn, according to law, deposes and says that he is an officer of The Helena Consolidated Water Company, the defendant herein who makes the foregoing answer, to wit, its president; that he has read said answer
183 and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

WM. A. CHESSMAN.

Subscribed and sworn to before me this the 6th day of February, A. D. 1895.

[SEAL.]

O. W. McCONNELL,
Notary Public in and for said County and State.

Received copy of the within this 6th day of February, 1895.

STEPHEN CARPENTER,
Attorney for Relator.

EXHIBIT "A."

Proposals for Water Supply for the City of Helena, Montana.

Notice is hereby given that, pursuant to an order of the city council of the city of Helena, Montana, the undersigned will receive bids until 12 o'clock noon of the 8th day of January, 1895, at his office *of* the city hall, in said city of Helena, for supplying the said city of Helena, with water for fire, sewerage, and other purposes for the term of one to ten years. For further information apply to the city clerk of said city of Helena. Proposals must be accompanied by bonds in the sum of five thousand dollars to enter into contract if bid shall be accepted. The right to reject any and all bids is expressly reserved.

STEVEN CARPENTER,
City Clerk of Helena, Montana.

184 *Certificate of Incorporation of the Helena Consolidated Water Company, Helena, Montana.*

TERRITORY OF MONTANA,
County of Lewis and Clarke, } *ss:*

We, the undersigned persons, each of lawful age and all citizens of the United States, desirous of forming a corporation for the purpose of carrying on a business designed to aid in the productive and industrial interests of the country and the development thereof, to the end that we may avail ourselves of the benefits of chapter twenty-five of the fifth division of the Compiled Laws of 1887, Montana Territory, entitled, "Corporations for industrial or productive purposes," and all acts and parts of acts amendatory thereof, or supplementary thereto, do hereby declare, certify and acknowledge as follows:

I.

That the corporate name of the said company shall be the "Helena Consolidated Water Company, Helena, Montana."

II.

The objects for which said company is formed are to acquire by grant, charter, purchase or otherwise, the franchise, right or privi-

lege of entering upon, using, occupying and enjoying the streets, alleys, avenues, thoroughfares, parks, grounds and public places of the city of Helena, for the purpose of laying, maintaining and operating water ways and water mains and connections, and
185 of erecting, operating and maintaining hydrants, stopcocks, turn-offs and such other appliance or appliances as may be necessary in the conduct or control of a system of water mains throughout the city; to acquire by purchase, grant, devise, appropriation or otherwise, water for the use of the said city of Helena and vicinity and the inhabitants there-, through the system of water mains aforesaid; to acquire by purchase, erection, construction or otherwise, any and all machine-shop-, pumping-stations, reservoirs, pumps, engines, boilers and all other buildings, structures, machines and machinery of every kind, character or description, necessary or convenient in the acquisition, construction, maintenance and operating of a complete water system for the purpose of supplying the city of Helena and vicinity and the inhabitants thereof with an abundant supply of good wholesome water for public, municipal, domestic, trade, manufacture, fire, sewerage, irrigation and other purposes; to sell, contract, furnish and deliver through such water system to the city of Helena and vicinity and the inhabitants thereof, water for public, municipal, domestic, trade, fire, sewerage, irrigation and other purposes.

III.

That the term of existence of said corporation shall be for the period of twenty (20) years from and after the 1st day of July A. D. 1889.

IV.

That the capital stock of said company shall be one million five hundred thousand dollars ($1,500,000), which shall be divided into fifteen thousand (15,000) shares, of the par value of one hundred dollars ($100) each.

186 V.

That the principal place of business of said corporation shall be in the city of Helena, Lewis and Clarke county, Montana Territory, but that the said corporation may have a branch office, if it is so determined upon by its board of trustees, either in the city of Boston, State of Massachusetts, or the city of New York, State of New York, where meetings of the board of trustees of said corporation may be held.

VI.

That the number of trustees who shall manage the affairs of the corporation for the first three months shall be five (5), and their names are as follows: George O. Freeman, Anselm J. Davidson, William A. Chessman, Albert R. Gates, and Clyde J. Tooker.

In witness whereof, we have hereunto set our hands and seals this 1st day of July, A. D. 1889.

CLYDE J. TOOKER. [SEAL.]
ANSELM J. DAVIDSON. [SEAL.]
WILLIAM A. CHESSMAN. [SEAL.]

In presence of:

——— ———.

TERRITORY OF MONTANA, } ss:
County of Lewis and Clarke, }

On this 1st day of July, A. D. 1889, personally appeared before me, I. Hamburger, a notary public in and for said county and Territory, Clyde J. Tooker, Anselm J. Davidson, and William A. Chessman, whose names are subscribed to the foregoing instrument as parties thereto, personally known to me to be the same per-
187 sons described in and who executed the said instrument, and who each duly acknowledged to me that they, each of them respectively, executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

I. HAMBURGER,
Notary Public, said County and Territory.

TERRITORY OF MONTANA, } ss:
County of Lewis and Clarke, }

I hereby certify the foregoing to be a true, correct and compared copy of the acticles of incorporation of the "Helena Consolidated Water Company," filed in my office this day.

Witness my hand and the seal of said county this 1st day of July, A. D. 1889.

J. S. TOOKER,
County Recorder.

UNITED STATES OF AMERICA, } ss:
Territory of Montana, }

I, Louis A. Walker, secretary of the Territory of Montana, do hereby certify that I have compared the annexed and foregoing copy of the articles of incorporation of the "Helena Consolidated Water Company," with the original thereof, filed in my office on the 1st day of July, A. D. 1889, and that the same is a correct transcript therefrom, and of the whole of said original certificate.

188 Witness my hand and the seal of the Territory of Montana, this 22d day of July, A. D. 1889.

LOUIS A. WALKER,
Secretary of the Territory of Montana.

Recorded in the office of the county clerk and recorder on the 1st day of July, 1889, at 3.10 p. m.
(Signed) J. S. TOOKER.

Certified copy.
Pleading filed February 6, 1895.
JOHN BEAN, *Clerk*,
By H. J. CASSIDY, *D. C.*

McCONNELL, CLAYBERG & GUNN,
Attorneys for Defendant.

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

STATE OF MONTANA *ex Rel.* THE CITY OF HELENA
vs.
THE HELENA CONSOLIDATED WATER COMPANY.

Demurrer.

Comes now the above-named relator, The City of Helena, and demurs to the answer of the said respondent, The Helena Consolidated Water Company, and for ground of demurrer avers that the
189 said answer does not state facts sufficient to constitute a defense to relator's petition for a writ of mandate herein.

STEPHEN CARPENTER AND
T. J. WALSH,
Relator's Attorneys.

Demurrer filed February 7, 1895.
JOHN BEAN, *Clerk*,
By H. J. CASSIDY, *D. C.*

STEPHEN CARPENTER,
T. J. WALSH,
Attorneys for Relator.

3026.

(Title of Court, Title of Cause.)

Order Sustaining Demurrer.

Done in open court this 20th day of February, 1895.

Relator's demurrer to answer herein was this day by court sustained and respondent was granted ten days with- which to file amended answer.
(Signed) HORACE R. BUCK, *Judge.*

190 In the District Court of the First Judicial District of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA on the Relation of THE CITY OF Helena, Plaintiff,
vs.
THE HELENA CONSOLIDATED WATER COMPANY, Defendant.

Opinion.

Proceeding in mandamus.

The City of Helena as relator seeks the intervention of this court to compel The Helena Consolidated Water Company, a corporation, as respondent, to furnish it with water for city purposes.

Respondent was incorporated under the general corporation laws of the Territory of Montana on July 1st, 1889. The purposes for which it was incorporated as set forth in its certificate of incorporation, were as follows:

"The objects for which said company is formed are to acquire by grant, charter, purchase or otherwise, the franchise, right or privilege of entering upon, using, occupying and enjoying the streets, alleys, avenues, thoroughfares, parks, grounds and public places of the city of Helena, for the purpose of laying, maintaining and operating water ways and water mains and connections
191 * * * to acquire by purchase, grant, devise, appropriation or otherwise water for the use of the said city of Helena and vicinity and the inhabitants thereof, through the system of water mains aforesaid * * * for the purpose of supplying the city of Helena and vicinity and the inhabitants thereof with an abundant supply of good wholesome water for public, municipal, domestic, trade, manufacture, fire, sewerage, irrigation and other purposes; to sell, contract, furnish and deliver through such water system to the city of Helena and vicinity and the inhabitants thereof, water for public, municipal, domestic, trade, fire, sewerage, irrigating and other purposes."

On January 15th, 1890, an ordinance was adopted by the city of Helena and accepted by the company, pursuant to the terms of which the latter was to furnish all the inhabitants of Helena with water at certain prescribed rates for twenty years; and after the first five years of said period, the city itself for city purposes, if it should desire to purchase water from the company. No rate was prescribed for the water for city purposes, however, if the city sh-uld desire to purchase during the fifteen years' period aforesaid. The ordinance also contained a contract whereby on terms provided in detail, the company was to furnish the city with water for the first five years.

This five year contract expired on January 20th, 1895.

The ordinance did not grant any exclusive privilege to the company for supplying water.

The city is solvent.

192 The pleadings show the facts aforesaid and also that shortly prior to this application for a mandamus, the city made a demand that the water company should supply it with water, which demand was refused. It is conceded that the water company has ceased to supply the city with water for municipal purposes.

To the affidavit or complaint of relator the respondent has answered, and a demurrer interposed to the answer is before me for a decision.

It is also conceded by the pleadings that the city can obtain the water it needs at the present time only from the source owned and controlled by the company.

Relator maintains that by reason of the acceptance of its franchise, respondent is in duty bound to supply this needed water at a reasonable rate, even without a tender of such rate by the city prior to the water being supplied.

Section 13, article VII of the city's charter is as follows:

"In all contracts involving the expenditure of one hundred dollars or more, the city council shall advertise the same with specifications for a period to be prescribed by ordinance, and award the same to the lowest responsible bidder."

Respondent urges that by virtue of said section and the city ordinance providing the details for its application that if it supplies water without an express contract resulting from an advertisement for bids, it cannot recover for the water furnished as to any excess in its value over $100.

193 To this relator answers that the company having a practicalmonopoly of water and being the only possible bidder to advertise for bids would be an act of supererogation.

Respondent contends further that even conceding no advertisement is necessary, still it is not in a position to be compelled to furnish the water demanded until it has been tendered a reasonable price for the same.

The pleadings also disclose that before January 20th, 1895, the date on which the ordinance contract between the parties hereto expired, the city advertised for bids as follows:

"*Proposals for Water Supply for The City of Helena, Montana.*

Notice is hereby given that, pursuant to an order of the city council of the city of Helena, Montana, the undersigned will receive bids until 12 o'clock noon of the 8th day of January, 1895, at his office in the city hall, in said city of Helena, for supplying the said city of Helena with water for fire, sewerage and other purposes for the term of one to ten years. * * *

STEVEN CARPENTER,
City Clerk of Helena, Montana."

And in reply to the advertisement aforesaid, respondent made the following offer to the city:

"To the honorable the mayor and city council of the city of Helena, Montana.

GENTLEMEN: * * * The Helena Consolidated Water Company submits the following proposition:

194 To furnish an ample supply of good water upon the same basis and terms as provided in the contract between said water company and said city now about to terminate, with the following exceptions:

I. That said contract shall be for a period of ten years.

II. That the company shall receive ninety dollars ($90) per year each, for two hundred and sixty-five (265) hydrants, as now located, or as may hereafter be located by the city, and sixty dollars ($60) per year each, for all hydrants which may hereafter be erected and furnished on extensions hereafter ordered by the city council. * * *

If the city desires to purchase the plant of this company the company hereby proposes to sell and convey unto said city its entire plant for the exact amount of the investment of said company in said plant to this date.

The required bond accompanies this proposal.

Dated Helena, Montana, January 8th, 1895.

HELENA CONSOLIDATED WATER COMPANY,
By WILLIAM A. CHESSMAN, *President.*

Attest:

[Seal of said Company]

JOHN B. CLAYBERG, *Secretary.*"

This bid was rejected by the city.

It also appears that prior to the commencement of this suit and subsequent to the rejection of the company's bid, the city de-

195 manded that the company should furnish it water for the period of five days and tendered $85 as a reasonable price therefor. This demand was refused.

While I do not deem the questions raised by this rejection of the company's bill and the tender refused by the company as material to a decision in the case, in the view I entertain as to the essential issues involved and to be decided, still they have been discussed by counsel in their arguments and briefs, and I shall briefly notice them, as they throw some light upon the attitude of these litigants with respect to each other and the conditions from which this controversy results.

The city requested proposals for a supply of water for the term of one to ten years, and the company's bid announced that its offer to supply water on the terms set forth was based upon the

condition that a contract should be awarded to it for ten years. It suggested no offer for a shorter period.

The bid of the company might fairly have justified an inference that it would not be willing to supply water to the city for a less period than ten years. Such an inference, if drawn, under the circumstances existing at the time, might reasonably have led to a conclusion on the part of the city that the water company considered itself in a position to dictate its own terms. I do not mean to be understood, however, as stating that such was the company's intention, or that the city drew such an inference or reached such a conclusion. I simply indicate possibilities in the matter. On the other hand, the demand of the city to be supplied with water
196 for so short a period as five days, even if the sum of $85 tendered was reasonable, which I do not even intimate, was so preposterously inconsiderate in view of the nature of the company's business and its general regulations for supplying water to consumers, that the company might fairly have inferred that the city intended to coerce it to terms by a system of petty harassment of which this demand was the ominous forerunner.

In all probability, however, this action on the part of the city was due to the fact that its officers were in doubt as to whether or not under the section of the charter regulating city contracts, a contract could be entered into for a longer period than five days without advertising for bids.

The first essential issue to be decided, is whether or not under section 13, article VII of the Helena charter, the city can enter into a contract for a water supply in a sum in excess of $100, without advertising for bids. If it cannot, as properly contended by its counsel, the water company, if it furnishes more than $100 worth of water, could not recover for the excess, by reason of the fact that the courts would not recognize a contract entered into by a city which is not authorized by its charter. But this water company has a practical monopoly of all the water available for the needs of the city of Helena and its inhabitants, and is the only possible bidder to respond to an advertised proposal for bids for a water supply. I fail to see the distinction, as applicable to this
197 case, urged by respondent's counsel, between a practical monopoly, that is to say, a monopoly the resultant of pre-existent lawful conditions, but not expressly authorized by law, and a legal monopoly; that is to say, a monopoly expressly granted by law. The test applicable here is whether a monopoly exists, whatever its character.

In Harlem Gas Co. *vs.* Mayor of New York, 33 N. Y. 309, an action brought to recover the price of gas furnished by a company without a contract resulting from an advertisement for bids which a city's charter apparently, just as Helena's charter does, expressly required, the court, on page 325, said:

"In the present case, an adoption of the construction claimed by the municipal authorities would lead to the absurd conclusion that the legislature designed to force a provision into the city charter

compelling the corporation to pay whatever price the sole bidder might choose to exact in his sealed proposals, for the use of property in which he has an absolute monopoly, and in relation to which there can be no competition within the range of legal possibility."

And again, on page 329, is this language:

"The purpose of the statutes is to insure economy in the public administration, and honesty, fidelity, and good morality in the administrative officers. Competitive offers or bids have no other object but to insure economy and exclude favoritism and corruption in the furnishing of labor, se-vices, property and materials for the uses of the city. This was the purpose and the only purpose of the framers of the statutes, and when they have this effect
198 given to them, nothing further is needed. They are not to have such a construction as to defeat this purpose, to impede the usual and regular progress of the public business, or to deprive the inhabitants even temporarily, of those things necessary and indispensable to their subsistence, their health, or the security and protection of their persons or property. Contingencies may arise when services, materials and property above the prescribed value may be immediately needed, and where competitive offers and written contracts would be unserviceable or impossible. In such a case the statutes would not apply, because such application could not have been intended. Whenever the nature of the service or of the property needed for the public uses, lor the time within which it must be had to prevent irreparable mischief under competitive offers is impossible, then the provisions of the acts referred to cannot apply; because such could not have been the intention of the law makers, and such emergencies were not amongst the mischiefs which the provisions referred to were designed to correct."

I adopt the principle announced in this case, and am clearly of the opinion that section 13 aforesaid would not bar a recovery by respondent for water furnished without a contract resulting from an advertisement for bids.

The case of Davenport *vs.* Kleinschmidt, 6 Mont. 502, holding that it was necessary for the city to advertise for bids for a water supply before letting a contract, arose and was decided at a
199 time when there were several different sources from which the city could have obtained the water it needed.

Having thus disposed of this issue as to advertisement, then both parties to this controversy agree that the city has a right to obtain water from the company at a reasonable rate. Respondent maintains, on the one hand, however, that this right results from the terms of a contract set forth in the water ordinance which prescribes that if the city shall desire to purchase water from the company after the expiration of the five years' contract, it may do so, and that the whole matter being strictly one of contract, the question of a public duty imposed upon the company by virtue of its acceptance of its franchise is eliminated, for the reason that mandamus cannot be invoked by one party to a contract to compel its specific performance by another. On the other hand, relator takes the broad

position that by the acceptance of its franchise, the right to exercise a public function was obtained by the company, and that the exercise of this function is a duty imposed by law clearly distinguishable in its nature from the right of an individual to absolutely control property of which he is the owner; and that in a case like this, where no rates are prescribed, upon a demand for a supply of water to the city, it must be complied with by the company at once without any right on the part of the latter to refuse to supply it until a reasonable rate is ascertained and tendered. Almost all the authorities hold that an inhabitant of a city demanding gas or water from a gas company or a water company, and tendering at
200 the same time a prescribed rate, upon being refused can compel a compliance with his demand by mandamus; and as stated by counsel for relator, both the elements of contract and public duty are involved in such a case. The law imposes the public duty and makes a contract in behalf of the would-be consumer who asks relief by mandamus. Consequently, I do not think respondent's counsel can sustain his theory that the question of a public duty is eliminated from the controversy before us. The water ordinance, by its mere expression that the city might purchase water if it so desired, neither added to nor took away the right of the city to obtain water at a reasonable rate from the company, for this right is derived from a contract entered into between the State and the company when it was incorporated. The granting and acceptance of a charter if incorporated always constitutes a contract. Even if the language aforesaid in the water ordinance was more definite, established a more specific contractual relation between these parties than it does, I am satisfied that if the company were to refuse to furnish the city with water under such conditions, that an application for a mandamus to compel it to do so could not be withstood solely on the ground that a contract having been entered into, no question as to a public duty could be considered. The relation of the company to the city, resulting from the public duty owed by the former to the latter, is paramount to any subsequent contractual relation entered into between themselves, whether express or implied. The latter relation is incidental and subservient to the former, and the court so regards it.

201 The decisions on which respondent's counsel rely to prevent the granting of a peremptory writ of mandamus by reason of an existing contract, are explained as follows:

"From the nature of the remedy as thus far disclosed, it is obvious that it relates only to the enforcement of duties incumbent by law upon the person or body against whom the coercive power of the court is invoked. It is not, therefore, an appropriate remedy for the enforcement of contract rights of a private or personal nature; and obligations which rest wholly upon contract, and which involve no question of trust or of official duty, cannot be enforced by mandamus:" High on Extraordinary Legal Remedies, sec. 25, p. 31.

The city, as relator in this action, is not invoking the aid of the court in behalf of its mere individual interests, and I cannot accept

the theory urged by respondent, that the city must be treated as a person or individual seeking to enforce a contract in which it alone, in a private capacity, is interested. Relator represents every one of its inhabitants in this proceeding, appears for them, individually and collectively, and I fail to see how it can be treated as an entity separate and distinct from the aggregate population from which its very existence is derived. In respect to a supply of water for fire and sewerage purposes, it has no interest capable of segregation or apart from the interest of all its inhabitants therein. It might be regarded as possessing such a separate interest as to a supply of water demanded for its city jail building, for instance, such a need
202 being capable of isolation; but when the use is a general one, as for fire or sewerage purposes, in which its need is inextricably mingled with the needs of its citizens, the blending of interests is inseparable.

Even if the city had another remedy in equity or law, as respondent contends it has under our code, the test would then be as to such remedy, barring this proceeding, whether it would be plain, speedy and adequate. What it seeks is an immediate supply of water. It cannot enjoin the company from doing what has already been done; *i. e.*, shutting off its supply of water.

Writs of mandamus and injunction, as is stated in High's Extraordinary Legal Remedies, section 6, possess striking points of resemblance: "Nevertheless," says the author, "an injunction is essentially a preventive remedy; mandamus, a remedial one." Could it recover for damages in any plain, speedy or adequate manner in the event of the buildings in the city being destroyed by fire by reason of their being no water with which to extinguish the flames, or in case of a pestilence generated in sewer pipes which had not been flushed?

Even if there is another remedy, it is obscure, slow and inadequate. The demand is for an instantaneous supply of water, needed, absolutely indispensable, without an hour's delay.

The authorities are almost unanimous that where a duty has been imposed upon a corporation to supply a necessity to the public, it must do so. As applied to gas companies, it is most stringent.

In volume VIII, page 646, American and Railroad Corporation Cases, the author, after a careful collation and résumé of the
203 decided cases between gas companies and private individuals invoking mandamus against them, says:

"Some of these cases are affected by statutes and some lay stress upon the fact that the company in question had an exclusive right to supply the gas; but most of them are decided on common-law grounds, and altogether they firmly establish the rule that a corporation organized for the purpose, or which undertakes to make and distribute gas for public and private use, whether it has an exclusive right or not, is bound to serve the public with impartiality and upon reasonable terms and conditions."

And if such is the rule as to corporations supplying such a need as gaslight only, with how much greater force can it be invoked in

behalf of a necessity for water—water to protect the health and property of the inhabitants of a city?

In the contention that before the city can compel a supply of water it must first tender reasonable rates for the same, however lies the main difficulty I encounter. Where rates have been prescribed, a private person, before he can obtain a mandamus, must tender them. And in all the cases of this class to which I have been cited, such rates have been prescribed and the question of their reasonableness as prescribed conceded. So as to a tender or its equivalent, under such circumstances, there is no difficulty. But here no rates are provided for, and in the absence of such a provision the law declares that the rates to be determined between the parties must be reasonable. As these parties disagree as to what are reasonable
204 rates, necessarily an interval of time, whether long or short, must ensue before such rates can be determined, and the aid of the courts may be invoked by both of these parties before the question is settled.

The answer of respondents sets forth its financial status, avers that the company is in debt and that the rates stated in its bid are the only rates at which it can afford to supply the city with water. The truth of these averments is not necessarily admitted by relator's demurrer; but even if they are and must be accepted as true, they furnish no absolute test for the ascertainment of a reasonable rate.

It appears that as to private consumers in the city the company is limited to certain maximum rates for a period of some fifteen years, and that there is a loss in respect to these rates as well as in respect to a previous supply of water to the city under the five-year contract. Now, if there is a loss in respect to water to be supplied private consumers, certainly in ascertaining a reasonable rate to be paid by the city, the latter has a right to insist that it shall not be required to make good any deficit arising or to arise from supplying private consumers at rates absolutely established for supplying them.

Mr. Justice Thornton, in Water Works *vs.* San Francisco, 82 Cal., on page 329, indicates in a general way, and I think correctly, the method whereby reasonable rates should be reached under the authorities. I quote his language:

"According to this rule, the rates must be fixed so as to allow money to be raised to pay the fairly necessary operating ex-
205 penses of the plaintiff in rendering the service required. In this I include taxes on the property of the plaintiff invested and used in rendering such service as part of such operating expenses.

"In fixing the compensation, regard must be had * * * to the value of the investment of the plaintiff in rendering the service required of it. * * * The obligation does not rest * * * to fix the rates so as to furnish money to the plaintiff to pay the interest on the bonds negotiated by it. If the plaintiff has invested the money borrowed on the bonds in purchasing property used by it in rendering the service due from it, the value of the property, as

said above, must be taken into consideration in fixing the reward or income it is to receive. When the value of such property has been taken into consideration and the compensation fixed in regard to it, to allow rates so as to raise a sum sufficient to pay the interest on the bonds would be to allow compensation for the property bought with the money raised on the bonds, and for interest on such money in addition. This would be to allow for it twice.

"If any portion of the money borrowed on the bonds was not invested in the property, needful, and used in rendering the service required of plaintiff, it would be manifestly unjust to compel the rate payers to pay interest on money so borrowed.

"If the bonds bear too high a rate of interest, the rate payers should not be required to furnish any money; if bound at all to furnish it for such purpose, to pay more than a reasonable rate of interest.

"The above considerations show that the rates should be
206 fixed so as to furnish compensation to the plaintiff based on the amount invested, and not on their bonds or any other debts. * * * And while a fair compensation, considering the value of its investment, should be allowed to the plaintiff, this compensation should be adjusted with regard to the rights of those who have to pay such rates to the plaintiff."

This was a case where a board was authorized to establish rates, but the principle applied in the present action.

The United States Supreme Court in Reagan *vs.* Farmers' Loan and Trust Co., 154 U. S. 362, comments on the principle, and it is also discussed in Ames *vs.* Union Pacific R. Co., 64 Fed. Rep., p. 165.

I cite the language of Judge Thornton and these United States decisions to show what an involved calculation will be required in case of no amicable settlement between these parties as to a reasonable rate, and also to indicate generally the rules under which it must be made.

It is well to emphatically suggest in this connection that the authorities of the city of Helena have no more right to act arbitrarily in the adjustment of these reasonable rates than the company has to insist upon more than the law guarantees it with a due regard for fairness to all concerned. To admit for one moment that either side could be permitted to coerce the other to terms would be abhorrent to the principles of justice for the administration of which courts exist.

The city is solvent. Respondent's counsel says: "We should not be driven to uncertain and tedious litigation after we have
207 furnished the water to ascertain what we will get for it." To this I say, certainly not, and quote Justice Brewer's answer to a somewhat similar objection, on page 394, Reagan *vs.* Farmers' Loan & Trust Co., 154 U. S. 362:

"It is enough to say in respect to these matters, at least so far as this case is concerned, that it is not to be supposed that the legislature of any State, or a commission appointed under the authority of any State, will ever engage in a deliberate attempt to cripple or

destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals."

It is not to be presumed that the City of Helena will deal unfairly with respondent.

I am of the opinion, then, that pending the settlement of these rates respondent must supply the city with water; that this results from the public duty imposed upon it when it accepted its charter from the State and its franchise from the city. To hold otherwise might be practically to declare that by reason of the primal necessity of obtaining this water, the city could not assert its rights and might be compelled by mere stress of circumstances to accede to any terms that might be dictated.

To place the city in such a position with reference to its own creation, a corporation brought into existence to minister to its vital wants, would be contrary to law.

As I view the situation, the main issue being as to the city's
208 right to an immediate supply of water, the company contests for a revenue which the courts will amply protect it in obtaining, the city for the health and property of its inhabitants, pay its own very existence, all of which would be jeopardized if I were to hold otherwise than as I do.

The demurrer is sustained.

HORACE R. BUCK, *Judge*.

Opinion filed February 20, 1895.

JOHN BEAN, *Clerk*,
By G. O. FREEMAN,
Deputy Clerk.

Opinion of Judge Henry R. Buck. Rendered February 20th 1895.

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA *ex Rel.* THE CITY OF HELENA, Plaintiff,
vs.
THE HELENA CONSOLIDATED WATER COMPANY, Defendant.

Amended Answer.

Now comes the above-named defendant, The Helena Consolidated Water Company, by leave of court first had and obtained, and for amended answer to the affidavit and writ of mandate on file herein, says:

209 I.

1. It admits the allegations in paragraphs one (1) to seven (7), inclusive, of the affidavit on file herein.

2. It denies that the said city duly advertised for bids for supplying the city with water for fire, sewerage and other purposes from and after the 20th day of January, 1895, in accordance with the provisions and conditions of the charter of said city.

3. It admits that said city, prior to the commencement of this proceeding, tendered to this company the sum of eighty-five dollars ($85), for five (5) days' supply of water for fire, sewerage and other purposes of said city, and demanded of this defendant that it furnish a sufficient supply of water to said city for said purposes, but denies that the amount so tendered was reasonable, and alleges the facts to be as hereinafter in this amended answer alleged.

4. Admits that this defendant refused, and still refuses, to supply the water so demanded upon the terms and for the prices tendered by the said city, and refuses to furnish water to said city at a less rate than the rate hereinafter stated, and also refuses to furnish water unless bids for a supply of such water are duly advertised for in accordance with the terms and conditions of the charter of said city, and unless a contract is duly entered into between this defendant and said city for such water in accordance with such charter and advertisement.

5. Denies that this defendant, prior to the passage of the
210 ordinance set forth in said city's affidavit became the owners of all the water rights and water available or adequate to supply the needs of said city and the inhabitants thereof.

6. It denies that this defendant is the only source from which water can be obtained to supply the said city of Helena, with a sufficient supply of pressure of water for fire, sewerage, and other purposes; but it admits that at present it is the only company or person having any franchise which will enable it, or him, to supply said city and the inhabitants thereof with water, and the only one in condition to immediately begin the delivery of such supply.

7. Denies that its bid set forth in said affidavit was, or is, unreasonable or excessive.

And this defendant for a further answer to said affidavit and writ, alleges:

1. That it is now, and at all the times hereinafter stated was, a corporation duly organized and existing under and by virtue of the laws of the State of Montana.

2. That the city of Helena is now, and at all the times hereinafter stated was, a municipal corporation, duly organized and existing under and by virtue of the laws of the State of Montana.

3. That on the 15th day of January, 1890, the said City of Helena, by its mayor and common council, duly enacted an ordinance, which is number 284, and a copy of which is attached to the affidavit of plaintiff on file herein, and reference is hereby made to said affidavit, and the same is hereby made a part of this answer.

4. That this defendant duly accepted the terms and condi-
211 tions of said ordinance, and both the city and this defendant have acted under the terms and conditions of said ordinance

from the date thereof up to and including the 20th day of January, 1895.

5. That under and by virtue of its certificate of incorporation, and the terms of said ordinance, this defendant became, and is now entitled to carry on its business in the city of Helena and its vicinity, and to furnish water to the inhabitants of said city at not exceeding the maximum rates fixed by said ordinance, for the period of twenty years from and after the passage of said ordinance, and also to furnish water to said city in case said city desires to purchase the same.

6. That under and by the terms and conditions of said ordinance, maximum rates were agreed upon between this defendant and the said city for furnishing the inhabitants of said city with water.

That since the expiration of said contract set forth in said ordinance, there has been, and now is, no agreement or contract between said city and this defendant for the furnishing of water to said city for fire, sewerage, or other municipal purposes.

7. That it is unreasonable to demand that this defendant furnish water to the city for municipal purposes from day to day and in violation of its reasonable rules and regulations.

That this defendant has duly adopted a rule and regulation that in all cases, unless qualified by special contract, all consumers are required to pay for water for three months in advance, except where meters are used, in which case consumers are required to pay at the end of each month.

212 8. That defendant further alleges that pursuant to the terms of said ordinance, and relying thereon, this defendant has completed a water system and has acquired ample facilities and water to furnish said city and its inhabitants with an abundant supply of water for municipal and other purposes; that said system has actually cost this defendant over the sum of fourteen hundred thousand dollars ($1,400,000); defendant alleges that it is ready and willing to so furnish the same at such prices as will enable this defendant to maintain and operate its plant, pay all its fixed and other necessary charges, and receive a reasonable compensation for the investment of its stockholders in said plant and property.

9. That pursuant to the provisions of said ordinance and contract, the said city directed the erection of two hundred and fifty-eight hydrants upon the mains of defendant in said city, for the purpose of furnishing water to the city. That said city determined that said hydrants were necessary for that purpose.

That defendant is the owner of said hydrants; that the city have used all of said hydrants for fire and other purposes.

That pursuant to the provisions of said ordinance and contract, the city equipped its sewers with flushing tanks, all of which have been supplied with water by defendant.

That it is usual and customary in all cities where the water is furnished by individuals or private corporations in establishing the reasonable value of water furnished for municipal purposes to base the same on a certain price for each hydrant maintained.

213 10. That this defendant has operated its plant in the most economical manner possible since the organization of this company; that it has paid no excessive salaries or other charges, but that every dollar that this company has earned has been properly applied to its plant and the operation thereof. That since the organization of this company, to wit, the 1st day of October, 1889, up to the 1st day of January, 1895, the receipts of this defendant from all sources have been less than its necessary expenditures in the amount of $33,009.58; that its earnings since the first day of January, 1890, to the 20th day of January, 1895, have been less than the actual and necessary disbursements of this defendant in and about said plant, and the operation thereof; that no dividend of any kind, character or description has ever been paid to any of the stockholders of said company since it commenced its operations.

11. That this defendant has not outstanding $949,000 in mortgage bonds; $709,000 of which bears semi-annual interest at the rate of six per cent. per annum; and $240,000 bears semi-annual interest at the rate of five per cent. per annum; that it has a floating indebtedness of $258,200, upon which it is compelled to pay various rates of interest running from seven to ten per cent. per annum; that the operating expenses, taxes, and licenses for the year 1894, have been $18,550.07; that this defendant paid $77,327.24 for interest on its outstanding obligations for the year 1894; that its receipts for the year 1894 from the city under said contract were $24,328.46, and its receipts for said year from all other sources
214 were $89,206.37, leaving a deficit in the treasury of the company of $6,770.94. That all moneys received from its bonds and other sources has been used in the purchase and completion of its plant except such as has been used in paying necessary interest and operating expenses.

12. That the present yearly revenues from the inhabitants of said city at the maximum rates fixed by said ordinance will leave a deficit in the treasury of this defendant of at least $24,000 after this defendant pays all of its fixed charges and operating expenses, and unless it receives a sufficient remuneration from said city to pay this deficit, it cannot operate nor carry on its business, and cannot furnish water to said city of Helena, or its inhabitants; that it cannot increase its charges for domestic services during the next fifteen years without the consent of the city council because of the provisions of said ordinance relative to maximum charges; that it has no other sources of revenue than from the city and its inhabitants.

13. That under and by virtue of the terms and conditions of its charter, from the State of Montana, it is given the power to contract for and sell water to the city of Helena and its inhabitants; that it is willing to sell said water to said city for municipal purposes at such price as will enable defendant to receive a reasonable compensation upon its investment. That eight per cent. per annum is a reasonable compensation upon the investment of the de-

fendant, and that no sum less than this amount would or could be a reasonable compensation.

215 14. That it was ascertained and determined by the said city at the date of the adoption of said ordinance that the revenues which defendant was entitled to derive from the plant as reasonable compensation was properly divisible between the inhabitants of said city in the way or manner therein divided. That a reasonable compensation to be paid by said city, for water for municipal purposes, was one hundred dollars ($100) per year per hydrant for the first two hundred hydrants, and seventy-five dollars ($75) per year per hydrant, for all additional hydrants ordered to be placed by said city. That there has been no change in the conditions since that time which would in any way or manner affect the reasonable value of defendant's services, and that the price then determined to be reasonable is still reasonable.

15. It denies that the amount tendered to this defendant by said city is a reasonable amount for the furnishing of water to the said city, and alleges that the only reasonable amount for such services and water is at the rate set forth herein.

That it cannot operate its plant and furnish said water for a smaller rate or sum without sustaining an absolute loss on its business in each and every year.

16. It alleges that the said City of Helena has no right to fix or establish any rate of payment for water to be furnished by this defendant to said city for municipal purposes.

17. It alleges that there is no duty devolving upon this defendant to furnish water to said city for municipal purposes except

216 under a purchase of said water from this defendant by said city. That this defendant is the owner of all the water brought into said city through its pipes, and has good right and lawful authority to sell and furnish the same.

Wherefore, this defendant asks that the proceedings herein be dismissed.

McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Defendant.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

W. A. Chessman, being first duly sworn according to law, deposes and says that he is an officer of The Helena Consolidated Water Company, the defendant herein who makes the foregoing answer, to wit, the president; that he has read said answer and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

WM. A. CHESSMAN.

Subscribed and sworn to before me this the 11th day of March, A. D. 1895.

[SEAL.]

O. W. McCONNELL,
Notary Public in and for said County and State.

McCONNELL, CLAYBERG & GUNN,
Attorneys for Defendant.

Answer filed March 14, 1898.

JOHN BEAN, *Clerk*,
By H. J. CASSIDY, *D. C.*

217 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA *ex Rel.* THE CITY OF HELENA, Plaintiff,
vs.
THE HELENA CONSOLIDATED WATER COMPANY, Defendant.

Motion for Writ of Mandate.

Comes now the above-named plaintiff, The City of Helena, and moves the court that a peremptory writ of mandate issue herein as prayed in the petition of the plaintiff, notwithstanding the amended answer of the defendant, which, plaintiff avers, does not state facts sufficient to constitute a defense to the application for the writ.

STEPHEN CARPENTER AND
T. J. WALSH,
Plaintiff's Attorneys.

218 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA *ex Rel.* THE CITY OF HELENA, Plaintiff,
vs.
THE HELENA CONSOLIDATED WATER COMPANY, Defendant.

Order Requiring Water Company to Supply Water.

The above-entitled cause coming on to be heard before the court upon the demurrer of the plaintiff to the answer of the defendant to the petition herein, and the court having heard the argument of counsel in reference thereto, J. B. Clayberg, Esq., and E. W. Toole, Esq., appearing and being heard in behalf of the defendant, and Stephen Carpenter, city attorney, and T. J. Walsh, Esq., appearing and being heard in behalf of the plaintiff, and the court having

taken the matter under advisement and having rendered and filed its decision sustaining the said demurrer, and the said defendant having, by leave of court, filed its amended answer herein, and the plaintiff having thereupon moved the court that a peremptory writ issue herein notwithstanding the said amended answer, and
219 the said motion having been by agreement of counsel submitted to the court without argument, and the court now being fully advised, hereby

Orders, adjudges and decrees, this 23d day of March, 1895, at and during a regular term of the said court, that the said defendant, The Helena Consolidated Water Company forthwith supply and continue to supply the city of Helena with a sufficient quantity and pressure of water for fire, sewerage, and other purposes.

And it is further adjudged that the said plaintiff have and recover of the defendant its costs herein taxed at — dollars.

By the court.

HORACE R. BUCK, *Judge.*

Order filed March 23d, 1895.

JOHN BEAN, *Clerk,*
By H. J. CASSIDY, *D. C.*

(Title of Court, Title of Cause.)

Order Granting Writ of Mandate.

Done in open court this 23d day of March, 1895.

Motion for judgment on the pleadings is granted herein, and peremptory writ is ordered to issue, to which ruling of the court defendant duly excepted.

(Signed) HORACE R. BUCK, *Judge.*

220 *Sheriff's Return.*

STATE OF MONTANA, }
County of Lewis and Clarke. }

OFFICE OF THE SHERIFF.

I hereby certify that I received the within writ of mandate on the 27th day of March, A. D. 1895, and personally served the same on the 27th day of March, A. D. 1895, upon the Helena Consolidated Water Company, by Frank J. Stever, superintendent, defendant, by delivering to said Frank J. Stever, supt. of the Helena Consolidated Water Company, personally, in the said county of Lewis and Clarke, said writ of mandate at the same time showing him the contents thereof.

Dated Helena, Montana, March 27, A. D. 1895.

J. HENRY JURGENS, *Sheriff,*
By FRED E. HOSS, *Under-Sheriff.*

Service	1.00
Mileage	.20
Copy	.40
Total	$1.60

221 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA on the Relation of THE CITY OF HELENA
vs.
THE HELENA CONSOLIDATED WATER COMPANY.

Writ of Mandate.

The State of Montana to the Helena Consolidated Water Company:

Whereas, on the 23d day of March, 1895, it was by the said court ordered that the said The Helena Consolidated Water Company forthwith supply and continue to supply the city of Helena with a sufficient quantity and pressure of water for fire, sewerage and other purposes, and on the said day it was by the said court further ordered that a peremptory writ of mandate issue commanding the said Helena Consolidated Water Company to so supply the said city:

Therefore, we do command you that immediately after the receipt of this writ you forthwith supply, and continue to supply
222 the said city of Helena with a sufficient quantity and pressure of water for fire, sewerage, and other purposes.

Witness, the Honorable Horace R. Buck, judge of the said court, and the seal thereof, this 27th day of March, A. D. 1895.

[SEAL.] JOHN BEAN, *Clerk.*

Copy of writ filed April 17, 1895.

JOHN BEAN, *Clerk,*
By JESS. O. RICKER, *D. C.*

STATE OF MONTANA, }
County of Lewis and Clarke, } *ss:*

I hereby certify that the foregoing is a full, true, correct and compared copy of the original judgment-roll in the case No. 3,026, State of Montana *ex rel. vs.* Helena Consolidated Water Company as the same appears to me of record.

In witness whereof, I have hereunto set my hand and affixed the official seal of this court, this 15th day of August, 1902.

[SEAL.] FINLEY McRAE, *Clerk,*
By REA C. CLEMENTS,
Deputy Clerk.

223 STATE OF MONTANA:

In the Supreme Court, June Term, 1897.

HELENA CONSOLIDATED WATER COMPANY, Plaintiff and Respondent,
vs.
WM. L. STEELE, Mayor of the City of Helena; MASSENA Bullard, City Clerk of the City of Helena; John B. Sanford, Wm. S. Spaulding, Frank J. Dewards, A. McMurphy, A. B. Keith, Jacob Fisher, George O. Freeman, J. Wick, George H. Piatt, E. L. Flaherty, C. G. Stubbs, J. B. Wilson, J. Post, and J. L. Walker, Comprising the City Council of the City of Helena, and The City of Helena, Defendants and Appellants. } No. 909.

Opinion.

(Submitted May 28th, 1897; decided June 7th, 1897.)

Statement of the case by the justice delivering the opinion.

224 This is a suit by injunction. It appears from the record that on the 29th day of July, 1895, an election was held in the city of Helena by which the legal voters of said city decided that the city might extend the limit of its indebtedness for the purpose of securing a water supply under the authority of section 6, article XIII of the constitution of the State, and the laws passed in pursuance of such constitutional provision. At a meeting of the city council of said city, after it had been determined by said election that the city might extend its indebtedness for the purpose aforesaid, the city council, by resolution, directed the city clerk to advertise for bids for a supply of water to be furnished to, owned and controlled by said city in accordance with plans and specifications which had theretofore been adopted by said city council. Thereafter the plaintiff water company commenced this suit to restrain the city from receiving bids for said purpose; the plaintiff contending in its complaint that it had established and was maintaining a water system in said city, and that by means of its said system the city had been for a long time furnished, and was then being furnished, with an ample supply of pure and wholesome water, and that under the provisions of subdivision 64 of section 4800 of the Political Code of the State the city was compelled by ordinance to purchase the water system of plaintiff, and had no authority to advertise for bids or to enter into any contract with any other person or persons, corporation or corporations, for a system of water supply for the inhabitants of said city.

The defendants answered, and among other things deny
225 that the city is prohibited from purchasing or supplying itself with another water system for the use of the city and

its inhabitants by the provisions of the law above referred to or by any other law

On a hearing the court issued its order restraining the defendants from advertising for bids for a water plant to be owned and operated by the city of Helena, in accordance with the prayer in the complaint. From this order the appeal is prosecuted.

Opinion of the court by PEMBERTON, chief justice:

There are a number of errors assigned in this record. The action of the court in striking out parts of appellants' answer is complained of. It is contended that the law referred to in the statement was not enacted in accordance with the requirements of the constitution. But we agree with the counsel for respondent that the only question presented for our determination is as to the constitutionality of the last two provisos of subdivision 64 of section 4800 of the Political Code. We shall not, therefore, discuss any minor matters involved, but proceed to an investigation of the real issue presented.

The two provisos involved constitute part of the law in relation to the legislative powers of incorporated cities and towns in this State. They read as follows:

"Provided, that whenever a franchise has been granted to, or a contract made with any person or persons, corporation or corporations, and such person or persons, corporation or corporations in pursuance thereof and in good faith have established and maintained a system of water supply, the city or town granting
226 such franchise, or entering into such contract, before taking any action for the procurement of a water supply to be owned or controlled by such city, or town, shall by the passage of an ordinance give notice to such person or persons, corporation or corporations, that it desires to purchase the plant and franchise of such person or persons, corporation or corporations, it shall have the right to so purchase the said plant upon such terms as the parties may agree; in case they cannot agree, then the said city or town may proceed to acquire the same under the laws relating to the taking of private property for public use.

"Provided, that no city or town having a water supply furnished by private parties, under a contract or franchise entered into or granted by the city or town, shall proceed to the erection or construction of a water plant to be operated by it, but in case the city or town shall desire to own and operate its water supply it shall acquire the plant already in operation therein as herein provided."

Has the legislature, by this enactment, undertaken to impose upon the city of Helena and its inhabitants an obligation unauthorized by the constitution, without the consent and against the will of the city council and the legally constituted authorities of the city?

By the first of these two provisos it became the duty of the city, before taking action to procure a water supply to be owned or controlled by the city, to pass an ordinance notifying the plaintiff, the owner of the water supply system then in operation, that it desired to pur-

chase the plant and franchise of the plaintiff upon such terms
227 as might be agreed upon, and in case of disagreement the city would proceed to acquire the plant of plaintiff by condemnation proceedings. The second proviso makes it absolutely incumbent upon the city, and all cities similarly situated, to purchase whatever water plant or system is in operation and owned by any person or corporation under contract entered into with or franchise granted by the city or town, at the time such city or town decides to procure, own or control a water system of its own. If any city or town desires to own its own water plant or system, this law requires it to purchase whatever water plant or system is owned or controlled by any person or corporation under any contract or franchise entered into with or granted by said city or town. The law compels the city or town to purchase, in one of the ways specified, whatever plant or system that is so owned or controlled in said city or town by any person or corporation under any contract entered into with or franchise granted by said city or town. The city or town has no discretion in the matter. The requirements of the statute are compulsory. To purchase such plant or system necessarily requires the city or town to incur an indebtedness. When an indebtedness is incurred by a city or town it necessarily requires the assessment of taxes upon the property of the inhabitants, and the collection thereof to meet and discharge such indebtedness. Is such indebtedness or obligation such a one as the State has the right to impose upon a city or town, or compel a city or town to assume without its consent? A city or town is bound to do and perform and
228 may be compelled to perform certain public duties. But there are certain local and private obligations and offices which a city or town may or may not perform, and which they cannot be compelled by the State to perform.

Discussing and distinguishing the questions here involved Judge Cooley, in People *ex rel.* Board of Park Comm'rs *vs.* Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 206, says:

"In People *vs.* Hurlbut, 24 Mich. 44, S. C., 9 Am. Rep. 103, we considered at some length the proposition which asserts the amplitude of legislative control over municipal corporations, and we there concede that when confined, as it should be, to such corporations as agencies of the State, in its government, the proposition is entirely sound. In all matters of general concern there is no local right to act independently of the State; and the local authorities cannot be permitted to determine for themselves whether they will contribute through taxation to the support of the State government, or assist when called upon to suppress insurrection, or aid in the enforcement of the police laws. Upon all such subjects the State may exercise compulsory authority, and may enforce the performance of local duties, either by employing local officers for the purpose, or through agents or officers of its own appointment. The same doctrine was declared in People *vs.* Mahaney, 13 Mich. 481, and in Bay City *vs.* State Treasurer, 23 *id.* 503. It was also recognized in the statement that in the levy of taxes for

purpose of general concern the municipal bodies cannot demand a right to be consulted, and their consent is im-
229 material. And we concur fully in the views which have been expressed by other courts in the cases to which our attention was called on the argument, that as regards duties which the people in the several localities owe to the Commonwealth at large, they cannot be allowed a discretionary authority to perform them or not, as they may choose. Such an authority would be wholly inconsistent with anything like regular or uniform government in the State.

"But we also endeavored to show in People *vs.* Hurlbut, that though municipal authorities are made use of in State government, and as such are under complete State control, they are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the State at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. * * * We also referred in People *vs.* Hurlbut to several decisions in the Federal Supreme Court and elsewhere, to show that municipal corporations, considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities, and as being entitled to exemptions, distinct from those which they possess or can claim as conveniences in State government. If the authorities are examined it will be found that these powers and capacities, and the interests which are acquired under them, are usually spoken of as private in contradistinction to those in which the State is concerned and which are called public, thus put-
230 ting these corporations, as regards all such powers, capacities and interests, substantially on the footing of private corporations. This distinction is very carefully drawn in Bailey *vs.* New York, 3 Hill, 531, which concerned the New York water works, and also in Small *vs.* Danville, 51 Me. —, Philadelphia *vs.* Fox, 64 Pa. St. 180, and Western College *vs.* Cleveland, 12 Ohio (N. S.), 375. It is well stated by Lewis, C. J., in Western Saving Fund Society *vs.* Philadelphia, 31 Pa. St. 183, in speaking of a municipal corporation as the owner of gasworks. 'The supply of gaslight,' he says, 'is no more a duty of sovereignty than the supply of water. Both of these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by these means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city; as much so as the houses and lands belonging to it.'"

Upon the same question Chief Justice Breese, in People *ex Rel.* McGagg *et al. vs.* The Mayor *et al.* of Chicago, 51 Ill. 17, 2 Am. Rep. 278, a case involving the question as to whether the city of Chicago could be compelled without its consent to assume a local indebtedness, said:

"If the principle be admitted that the legislature can, uninvited, of their mere will impose such a burden as this upon the city of Chicago, then one much heavier and onerous can be imposed—in short no limit can be assigned to legislative power in this
231 regard. If this power is possessed, then it must be conceded that the property of every citizen within it is held at the will and pleasure of the legislature. Can it be that the General Assembly of the State, just and honest as its members may be, is the depositary of the rights of property of the citizens? Would there be any sufficient security for property if such a power was conceded? No well-regulated mind can entertain the idea that it is within the constitutional competency of the legislature to subject the earnings of any portion of our people to the hazards of such legislation.

"We fail to perceive any real difference, in principle, in forcing this burden upon the city, and imposing a like burden by the direct action of the legislature upon individual property owners within it, for in both cases the debt at maturity must be paid by such holders, while the accruing interest is a constant drain upon their resources.

"No case, amid the multitude which have been cited by the relators, goes to the extent of this, and with our understanding of the constitution, no warrant is found there for such legislation. Rather than attempt to compel submission to such a law, surely the alternative should be presented to the city, to be deprived of its corporate franchises, for cases, if such legislation is sanctioned, may arise where a city would prefer such deprivation in preference to incurring a debt which might prove greatly detrimental to their prosperity, or wholly ruinous."

232 Judge Breese was discussing the power of the legislature to impose these local burdens or debts upon cities or towns under the constitution of Illinois, and concludes that the legislature has no such power.

Section 5, article 9 of the Illinois constitution, under which the decision referred to was rendered, gave the power to cities and towns to assess and collect taxes for corporate purposes.

The provision of our constitution upon the subject is as follows: "The Legislative Assembly shall not levy taxes upon the inhabitants or property in any county, city, town, or municipal corporation for county, town or municipal purposes, but it may by law vest in the corporate authorities thereof powers to assess and collect taxes for such purposes." (Sec. 4, art. XII, Constitution.)

It will be seen that our constitutional provision is much stronger, and goes much further in favor of the powers of cities and towns to assess and collect municipal taxes than does the Illinois constitution. Our constitution says the legislature shall not levy taxes upon the inhabitants or property in any city or town for municipal purposes. It cannot be disputed that the indebtedness sought to be imposed upon the cities and towns by the legislation under discussion, without their consent, is for local municipal purposes. Nor can it be disputed that to compel the city of Helena, and other cities and

towns, to assume such indebtedness against its will by this legislation also compels the assessment and collection of taxes by the city against its will for the purpose of paying this compulsory indebtedness.

233 Speaking of such legislation, Judge Cooley, in People *ex rel.* Board of Park Comm'rs *vs.* Common Council of Detroit, *supra*, says: "The constitutional principle that no person shall be deprived of property without due process of law applies to artificial persons as well as natural, and to municipal corporations in their private capacity, as well as to corporations for manufacturing and commercial purposes. And when a local convenience or need is to be supplied in which the people of the State at large, or any portion thereof outside the city limits, are not concerned, the State can do no more, by process of taxation, take from the individual citizens the money to purchase it, than they could if it had been procured, appropriate it to State use. To this extent the corporate right appears to us to be a clear and undoubted exception to the general power of control which is vested in the State.

"Whoever insists upon the right of the State to interfere and control by compulsory legislation the action of local constituency in matters exclusively of local concern should be prepared to defend a like interference in the action of private corporations and of natural persons. It is as easy to justify, on principle, a law which permits the rest of the community to dictate to an individual what he shall eat, and what he shall drink, and what he shall wear, as to show any constitutional basis for one under which the people of other parts of the State, through their representatives, dictate to the city of Detroit what fountains shall be erected at its expense for the use of its citizens, or at what cost it shall purchase and how it

234 shall improve and embellish a park or boulevard for the recreation and enjoyment of its citizens. The one law would rest upon the same fallacy as the other, and the reason for opposing and contesting it would be the same in each case."

Upon this subject Chief Justice Breese, in People *vs.* Mayor *et al.*, of Chicago, *supra*, says: "So sensibly impressed were the framers of our Constitution of the liability of legislative bodies to incur debts, sometimes for objects not entirely praiseworthy or useful, and the hazards, losses, and disturbances to which they lead, that they interposed the power of the people at the very threshold to prevent this danger—to tie up the hands of the legislature on this subject—to divest it of a power which dear-bought experience has satisfied the people should not be left unrestrained.

"The burden imposed by this law upon a fractional part of this State is tenfold heavier than the legislature can impose upon the people of the whole State, without their previous consent, manifested by a vote at a general election. In view of this wise and salutary provision of the constitution, can it be seriously contended that the legislature can exercise the assumed power to force one and all the municipalities of the State to incur debts amounting to millions of dollars by one dash of the legislative pen, for corporate purposes,

when, to meet the most urgent demands of the public, and provide for the general welfare, they cannot create a debt against the State exceeding the sum of $50,000? The proposition is so incon-
235 sistent with the spirit and plain intention of this provision that it can receive no favor in this court.

"How can we hold, in view of the protection this clause was designed to give the people of the whole State, that the people of a particular municipality can be subjected to a corporate debt without the consent either of the people to be taxed or of their corporate authorities?

"The protection of the whole implies, necessarily, the protection of all its organized parts, and the whole cannot be secure while all or any of its parts are exposed to danger. What is the real value of this provision of the constitution, if the legislature inhibited from incurring a debt beyond $50,000 on behalf of the State, may force a debt tenfold or one hundred fold greater, for there is no limit to the power, upon all the cities of the State? We can perceive none. Where these municipalities become so indebted by compulsion of the legislature, the whole State in its real and substantive, if not in its corporate, body, will in truth and in fact be the debtor, for the same power of coercion can be applied to counties and towns, and, as the State is made up of cities, counties and towns, the whole State may thus become involved. This provision then, would be no restriction upon the power to create a debt beyond a certain amount, and would fail of its purpose of protecting the State and its citizens from oppressive burdens. Those citizens who are to be affected by the debt should certainly have some voice in its creation, on the same principle that the people of the whole State are to express their consent, by a vote, to the creation of a debt affecting them and their material interests."

These two decisions from which we have quoted so largely,
236 delivered by two of the ablest jurists that this country has produced, are leading cases upon the questions involved in this appeal. These two distinguished judges declare that the cases have been exhaustively argued by the best lawyers of the respective States. These cases are in our judgment absolutely conclusive of the one question presented by this appeal—namely, the constitutionality of the compulsory statute under which this action is prosecuted. See, also, People *ex rel.* Dunkird *et al. vs.* Batchellor, 53 N. Y., 128, 13 Am. Rep., 480; Dillon's Municipal Corporations, vol. 1, sec. 72 *et seq.* (4th ed.).

It is contended by appellants that the law in question is void, because in violation of section 13, article XV of the constitution, in that "it imposes on the people of the city a new liability in respect to transactions or considerations already passed."

At the time of the enactment of this law the city was under no obligation to buy the plaintiff's water plant. The fact that the plaintiff had established, was the owner of and was controlling and operating its plant under the contract with, or franchises granted by the city, at the time of the enactment of the law, constituted no

valid consideration for this compulsory indebtedness. If this constituted a consideration it was passed. Under the contract or franchise upon which the plaintiff bases its right of action the city reserved the right to enter into contracts with and purchase water from any other person or corporation for city purposes. The city, so far as shown, has never at any time assumed any sort of obligation to purchase plaintiff's plant.

237 It is contended that the moral obligation of the city to assume this compulsory indebtedness is sufficient to support the law and relieve it of its unconstitutionality if it be in conflict with the constitution.

But we are unable to see what moral obligation the city is under or has ever assumed that would bring the law under the rule contended for by counsel for respondent. The city never agreed to continue for all time to buy water of the plaintiff; it expressly reserved the right to do otherwise. Plaintiff's plant may not be capable of furnishing an ample supply of wholesome water for the inhabitants of the city, either now or as the city may expand and increase in population in the future. The plant and system may be practically worthless. It may be so involved in debt and encumbered that the plaintiff could convey no title for any sum proportionate to its real value. To purchase the plant might so increase the indebtedness of the city as to exceed the constitutional limit, or, at any rate, so as to become ruinous to the inhabitants of the city. The city may be able to procure a water system and supply for half what plaintiff's plant would cost. Is there any such moral obligation on the part of the city disclosed in this case as would justify this court in compelling it to assume the indebtedness necessary for it to assume in order to purchase plaintiff's plant and tax the people for the money to meet such indebtedness in total disregard of all these possible and probable events? Shall it be said in obedience to this law that the city authorities—the legal representatives of the inhabitants of the city—have no discretion in the

238 premises but must obey notwithstanding disaster and oppressive taxation and ruin may come upon the people as a consequence.

We think the two provisos of the law under discussion are in violation of the clauses of the constitution quoted and referred to above, as well as the spirit of our governmental system which recognizes "that the people of every hamlet, town and city of the State are entitled to the benefits of local self-government." The law is not supported by any moral obligation, but is rather a violation of law, equity, the constitution as well as the principle of moral obligation invoked by the respondent. It violates the general rule of the law that the consent of parties to a contract is essential to its validity, whether the parties be natural or artificial persons. We are at a loss to find any theory of law, equity or justice upon which we can conscientiously sustain the constitutionality of the statute in question.

The judgment and order appealed from are reversed and the

cause remanded with directions to dissolve the injunction and dismiss plaintiff's complaint.

W. Y. PEMBERTON,
Chief Justice.

We concur:
WM. H. HUNT,
Associate Justice.
HORACE R. BUCK,
Associate Justice.

239 STATE OF MONTANA:

I, Henry G. Rickerts, clerk of the supreme court of the State of Montana, hereby certify that the foregoing is a full, true and correct copy of the opinion filed by the supreme court of the State of Montana, on the 7th day of June, 1897, in case No. 909. Helena Consolidated Water Company, respondent, *vs.* Wm. L. Steele, mayor of the city of Helena *et al.*, appellants.

[SEAL.] HENRY G. RICKERTS,
Clerk of the Supreme Court of the State of Montana,
By WILLIAM H. CURTIS,
Deputy Clerk.

And thereafter, to wit, on the 20th day of August, 1902, amendment to agreement upon facts was filed herein, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Amendment to Agreement upon Facts.

It is also stipulated that the attached is a correct copy of
240 the answer, after striking out that portion thereof by order of court, on motion of plaintiff, ordered stricken out, in the action referred to in the 8th paragraph of the agreed statement of facts herein; and it is also further stipulated that this amendment be added to and form a part of the 8th paragraph of said original stipulation.

Dated August 20, '02.

CLAYBERG & GUNN AND
CARPENTER & CARPENTER,
Solicitors for Complainant.
EDWARD HORSKY,
R. LEE WORD, AND
TOOLE & BACH,
Solicitors for Defendant.

241 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

HELENA CONSOLIDATED WATER COMPANY, Plaintiff,

vs.

WILLIAM L. STEELE, Mayor of the City of Helena; MESSENA BULLARD, City Clerk of the City of Helena; John B. Sanford, Wm. S. Spalding, Frank J. Edwards, Augustus McMurphy, Adelphus B. Keith, Jacob Fischer, George O. Freeman, John Wick, George H. Piatt, Edward L. Flaherty, Charles G. Stubbs, John B. Wilson, Jacob Post, and Jacob L. Walker, Comprising the City Council of the City of Helena, and The City of Helena, Defendants.

Answer.

Now come the above-named defendants, and for answer to the plaintiff's complaint heretofore filed in said cause—

242 I. Admit the allegations contained in paragraphs I, II, III and IV of the plaintiff's complaint.

II. Admit that the defendant is a taxpayer of the city of Helena; but deny that plaintiff's alleged water system or supply will be irreparably or otherwise damaged or injured by any act of the defendants alleged in the complaint.

III. Admit that in the month of July, 1895, there was submitted to the taxpayers of the city of Helena the proposition of extending the constitutional limit of the indebtedness of said city for the purpose of acquiring a water supply by purchase, which water supply should be the property of the city of Helena; and admit that a vote was had upon said proposition at said election; but the defendants deny that by said vote the city council was directed to proceed to acquire its own water system and supply, or to issue bonds in payment therefor; but the defendants allege that by said vote at said election the said city was given the option to acquire such supply as it saw fit.

IV. Admit the enactment and passage of ordinances numbered 95 and 248 by the city council of the city of Helena as alleged in the complaint; but the defendants deny that the plaintiff, or its predecessors in interest, proceeded to establish or maintain, or has for over five years, or any other time last past, established or maintained a system of water supply in said city; and deny that the said plaintiff corporation has furnished to the city of Helena or the inhabitants thereof an ample supply of pure or wholesome water; deny that it is now maintaining a water supply or furnishing

243 an ample supply of pure or wholesome water to said city or its inhabitants as alleged in the complaint; and admit that the franchise granted by ordinance numbered 248 to the plaintiff corporatien will continue in force before its expiration for a number of years to come.

V. Admit the allegations of paragraph VIII of the complaint.

VI. Deny that immediately after the determination of the said election of July, 1895, or at any other time, it became or was the duty of the city council of the city of Helena to notify this plaintiff by the passage of an ordinance, or in any other manner, save as hereinafter alleged, of its desire to purchase plaintiff's or any other water system; and deny that the city council of the city of Helena has taken no steps or action looking to the acquisition of a water supply, or neglects, fails, or refuses so to do.

VII. Admit the allegations contained in paragraph X of the complaint.

VIII. Deny that the plaintiff as a taxpayer or otherwise, is directly, or otherwise, injured by said proceeding of the city council as alleged in the said complaint.

IX. Deny that under or by virtue of any law of the State of of Montana the city has no power, right or authority to purchase, own or control any water system or water supply save or except that claimed by the plaintiff to be now owned and maintained by it.

X. Deny that the said city, acting by or through its council and other officers, threatens to enter into a contract to purchase a water supply, pursuant to the terms of said advertisement, from
244 any person or corporation other than the plaintiff; deny that it threatens or will unless restrained by this court receive or accept the proposition or propositions to enter into a contract with the maker of any proposition to purchase a water supply in violation of any law of the State of Montana to the injury of this plaintiff as a taxpayer or of its property in the manner alleged in the complaint, or otherwise or at all.

XI. Deny that the plans and specifications adopted by the city council specified in its proposed advertisement for bids for a water supply were prepared or adopted fraudulently or for the purpose of preventing this plaintiff making any bid thereunder or competing with any other person or corporation in the sale of a water supply to the said city; and deny that the said plans and specifications were adopted for the express or other purpose of preventing said city from purchasing a plant or system of this plaintiff or for the express purpose of enabling said city to cause to be constructed or to purchase a water system other than that owned by the plaintiff as alleged in the complaint. And deny that the said plaintiff can not become a bidder under said advertisement, or that it cannot compete on said bids, for the reason that its plant and system does not comply with the plans and specifications adopted by the city council, or that said plans and specifications are such that there can be no competition of bidding, or that it would be impossible thereunder for the city to accept the lowest responsible bid.

XII. Deny that all or any of the acts or intended acts of
245 the defendants are without authority of law or illegal, or that they will cause great or irreparable or any injury to this plaintiff or its property.

XIII. Deny that the plaintiff or its property is damaged or injured by any act or intended act of the defendants whatsoever as alleged in said complaint, or otherwise or at all.

Wherefore, the defendants pray that by order of this court the plaintiff and its officers, agents, attorneys, counselors, servants and employees, and all persons acting or claiming to act by, through, or under it, may be forever enjoined and restrained from in any manner interfering or attempting to interfere with the defendant city, or its council, or agents or officers in their efforts and endeavors to procure and obtain an ample and sufficient and adequate supply of pure and wholesome water for the inhabitants of the city and its own uses.

MASSENA BULLARD,
City Attorney.
TOOLE & WALLACE AND
H. G. & S. H. McINTYRE,
Attorneys for Defendants.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

George O. Freeman, being duly sworn, deposes and says: That he is an officer of The City of Helena, one of the defendants named in the above-entitled action, to wit, an alderman of said city, and as such makes this verification for and in its behalf; that he has read the foregoing answer and knows the contents thereof, and
246 that the matters and things therein stated are true to the best knowledge, information, and belief of affiant.

G. O. FREEMAN.

Subscribed and sworn to before me this 2d day of January, 1896.

CHAS. A. SPAULDING,
Notary Public, Lewis and Clarke County, State of Montana.

(Endorsed:) Title of court and cause. Amendment to agreement upon facts. Filed August 20th, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy.

And thereafter, to wit, on the 20th day of August, 1902, an order for final decree was made and entered, which is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

HELENA WATER WORKS COMPANY
vs.
THE CITY OF HELENA. } No. 619.

Order for Final Decree.

This cause came on regularly for hearing upon an agreed statement of facts. Messrs. Clayberg & Gunn and Carpenter & Carpenter appearing for the complainant, and Messrs. Edward Horsky, Esq., Word & Word, and Toole & Bach appearing for defend-
247 ant, and after argument of counsel cause submitted; and after due consideration it was ordered and decreed that the defendant be restrained from constructing a water plant to supply the citizens of Helena, Montana, with water.

Done in open court August 20th, 1902.

And thereafter, to wit, on the 21st day of August, 1902, a final decree was duly signed and entered, which is entered of final record as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Final Decree.

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows: That the writ of injunction heretofore issued in this cause be, and the same is, hereby made permanent, and that the said defendant, its officers and agents, and each and all thereof, be, and they are hereby, enjoined and restrained from acquiring a water plant, system or supply (other than the plant, system and supply of complainant) to be owned or con-
248 trolled by it, for the purpose of supplying its inhabitants, or any thereof, with water, and from furnishing or supplying said inhabitants, or any thereof, with water until after the expiration of the franchise granted to the Helena Consolidated Water Company, its successors and assigns, by ordinance No. 248 of the ordinances of said city, to wit, January 15th, 1910.

And it is further ordered, adjudged, and decreed that said complainant recover its costs herein, taxed at the sum of — dollars.

Dated this 21st day of August, A. D. 1902.

HIRAM KNOWLES, *Judge.*

(Endorsed:) Title of court and cause. Final decree. Filed and entered August 21st, 1902. Geo. W. Sproule, clerk. By Fred H. Drake, deputy clerk.

And thereafter, to wit, on the 21st day of August, 1902, an order was made allowing exceptions to final decree, which order is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY
vs.
THE CITY OF HELENA. } No. 619.

Order Allowing Exceptions to Final Decree.

Upon court signing the final decree and announcing same,
249 counsel for defendant thereupon filed written exceptions thereto, and thereupon the court signed a written order allowing same.

Done in open court, August 21st, 1902.

And thereupon, to wit, the 21st day of August, 1902, exceptions to final decree were filed, which said exceptions are as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Exceptions to Final Decree.

And now comes the defendant and files this, its objections and exceptions to the decree in favor of complainant, and especially that portion thereof enjoining and restraining said defendant from constructing, putting in and completing its contemplated water works and system, at any time it may deem it proper and expedient to do so; and ask that said restraining order be limited and confined to
the sale, distribution, or furnishing of water to the citizens
250 and inhabitants of the said city, during the existence and life of the said ordinance No. 248, or until permitted so to do by the court.

Dated August 21, 1902.

EDWARD HORSKY,
TOOLE & BACH, AND
R. LEE WORD,
Solicitors for Defendant.

(Endorsed:) Title of court and cause. Exceptions to decree. Filed August 21st, 1902. Geo. W. Sproule, clerk. By Fred H. Drake, deputy clerk.

And thereafter, to wit, on the 21st day of August, 1902, a bill of exceptions was duly allowed, signed and filed, and which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Bill of Exceptions.

Be it remembered at the argument of this suit upon the issues joined, the agreed statement of facts and exhibits thereto
251 attached, it was insisted that if any decree was rendered and passed in favor of complainant that *that* the decretal order therein be limited to the sale, distribution or furnishing of water by said city under its contemplated plant, to the citizens and inhabitants of the said city, and that said city be permitted to exercise its business function and discretion in constructing, putting in, and completing its water system and plant at any time it may deem advisable and feasible to do so, and that said injunction be so limited accordingly, and upon the presentation of said decree said defendant objected and excepted thereto, for that the same should be limited as aforesaid, so as to allow the said defendant to construct, put in, and complete, said water works and plant for the purpose of furnishing and supplying both the said city and inhabitants at any time it may deem it advisable and feasible, and that such injunction and restraining order be confined to the sale, distribution or furnishing of water to said citizens and inhabitants, if any decree is signed and passed in favor of said complainant.

And the court, notwithstanding such objections and exceptions, and request for modification and limitation of said injunction, rendered and passed the decree herein, to which decree, as well as the refusal to limit and modify as aforesaid, defendant excepted; and this, its bill of exceptions, is, at the time, and in open court, signed, sealed, and made a part of the record herein.

Dated August 21, 1902.

HIRAM KNOWLES,
Judge of said Court.

252 (Endorsed:) Title of cause and court. Bill of exceptions. Filed and entered August 21st, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy clerk.

And thereafter, to wit, on the 22d day of August, an assignment of errors was filed herein, which is entered in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the State of Montana. In Equiiy.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Assignment of Errors.

The defendant files the following assignment of errors upon which it will rely upon its appeal from the decree of the court, and decretal order therein contained, granting an injunction herein in favor of complainant and against defendant in the above-entitled cause, on the 21st day of August, A. D. 1902, viz.:

1. The court erred in overruling the defendant's plea to the jurisdiction to the complainant's bill herein. For that the State court had acquired jurisdiction over the subject matter, by pro-
253 ceedings under the law of eminent domain, and actions commenced in said court for the purpose of enjoining defendant from expending any money for the purposes mentioned in the complaint herein, which were and are still pending in said court, and for the causes and reasons set out in said plea.

2. The court erred in overruling refendant's demurrer to the complainant's bill herein. For that said bill of complaint is multifarious in that it comprises two separate and independent causes of suit, one upon an alleged contract, and the other as a taxpayer of said city. Improperly unites a suit arising upon a contract, and one arising upon an alleged tort; and for that said complaint does not state facts sufficient to authorize an injunction herein, or to entitle complainant to any relief whatever, and for the causes set out in the said demurrer.

3. The court erred in entering and rendering any decree or injunction in favor of complainant, and against defendant under the pleadings, agreed statement of facts and exhibits made a part thereof, for the reason that no contract, express or implied, is shown under said ordinance 248, or otherwise, nor was there any legal or equitable obligation of duty shown on the part of the defendant by which it has granted away, or in any manner deprived or disabled itself from constructing, putting in and completing its water system or plant, at any time it saw proper to do so, in the exercise of its business functions, and discretion, and powers under the constitution and laws of the State of Montana; nor has it in any manner, during the existence of said ordinance, ceded away or de-
254 prived itself of the right and power to furnish and supply the citizens and inhabitants of said city with water.

4. The court erred in not limiting and confining said decree and injunction, to the sale, distribution, and furnishing of water to the inhabitants of said city, for that there is no contract, obligation, or duty, express or implied, that said defendant will not in the mean time, when it sees proper and deems it expedient to do so, construct, put in and complete said water system and plant, so as to have the same available and ready for use for all lawful purposes, at the expiration of the term of said ordinance and franchise to complainant.

5. Because under said pleadings, agreed statement of facts, and exhibits thereto attached, said complainant neither in its own right or as a taxpayer, was or is entitled to said decree or injunction, or any relief whatever for that it clearly and indisputably appears that all the contemplated proceedings and doings of said defendants in constructing, putting in, and completing said water system and plant, and all expenditures to be made in connection therewith, are to be, and will be, in strict accordance with the constitution and laws of said State, and that there is no threatened illegal or unlawful act or acts to be enjoined or restrained.

6. The court erred in not modifying and limiting said decree and injunction therein contained, as requested by defendant, and which will more fully appear by its bill of exceptions, signed, sealed and made a part of the record herein, on the 21st day of August, A. D. 1902, and to which reference is hereby made.

255 7. The court erred in not holding that the judgment in the case of The Helena Consolidated Water Company (the predecessor in interest of complainant) *vs.* William L. Steele, *et al.*, was not *res judicata* and conclusive of the right and title relied upon by complainant herein, for that it appears that the rights, duties and obligations imposed by said ordinance were prior and superior to said mortgage and all rights thereunder, and it was and is subject to the construction and interpretation given said ordinance by the court in the case aforesaid, wherein and whereby it was necessarily and actually determined, that complainant, neither as a taxpayer or otherwise, is or was entitled to the rights now and here claimed by it; said judgment being rendered without fraud or collusion, and the presumptions therefrom being unrebutted, all of which appears by the pleadings, exhibits and agreed statement of facts.

8. The said judgment not being in any way impeached or assailed for fraud or collusion or otherwise, and being in full force and effect and unrebutted, was and is conclusive of the rights of complainant as such successor and privy as to all matters therein actually or necessarily determined, among which were, that said complainant's predecessor and privy was not, as a taxpayer, or under said ordinance 248, or under said unconstitutional act of said Legislative Assembly, entitled to any relief whatever, and for that said action was dismissed upon its merits, and necessarily and actually determines all the questions here involved, adversely to any claim of complainant that would entitle it to the relief granted, or any relief whatever.

256 9. Because it appears from the pleadings, agreed statement of facts and exhibits, that the rights adjudged to complainant and necessary to support said decree and injunction, and any and all contractual obligations or duties to that effect under said ordinance, are in contraversion of the constitution of said State and laws passed in pursuance thereof, and that if any such obligations or duties ever existed under any contract, or obligation express or implied the same terminated and expired five years after the adoption and approval of said ordinance since which time the duties, obligations and liabilities are of a public nature, and such as are imposed and grow out of the franchises and privileges granted and none other.

10. The court erred in not rendering judgment for defendant in not dismissing said complainant's bill of complaint, upon the issues presented by the pleadings, agreed statement of facts and exhibits, for that, as matter of law, it thereby appears that there is no equity or right in the complain-t entitling it to any relief, and that defendant was and is entitled to do and perform the acts and things contemplated and intended to be done and performed by it.

In order that the foregoing assignment of errors may appear of record, the defendant presents the same to the court, and prays that such disposition be made thereof as in accordance with the
257 law and statutes of the United States in such cases made and provided.

All of which is,
Respectfully submitted,

EDWARD HORSKY,
TOOLE & BACH, AND
R. LEE WORD,
Solicitors for Defendant.

Due service of the foregoing instrument and receipt of a true copy thereof are hereby acknowledged and admitted this 22d day of August, 1902.

CLAYBERG & GUNN,
Solicitors for Complainant.

(Endorsed:) Title of court and cause. Assignment of errors. Filed and entered August 22d, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy clerk.

258 And thereafter, to wit, on the 22d day of August, 1902, the petition for appeal and order allowing same were filed and entered, which are in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Petition for Appeal and Order Allowing Same.

The above-named defendant, conceiving itself aggrieved by the decree made and entered on the 21st day of August, A. D. 1902, in the above-entitled cause, does hereby appeal from said order and decree to the United States circuit court of appeals for the ninth circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon
259 which said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

Dated August 21, 1902.

EDWARD HORSKY,
TOOLE & BACH,
R. LEE WORD,
Solicitors for Defendant.

The foregoing claim of appeal is allowed.
Dated August 22d, 1902.

HIRAM KNOWLES,
Circuit Judge.

Due service of the foregoing instrument and receipt of a true copy thereof are hereby acknowledged and admitted, this 22d day of August, A. D. 1902.

CLAYBERG & GUNN,
Solicitors for Complainant.

260 And thereafter, to wit, on the 22d day of August, 1902, the bond on appeal, duly approved, was filed herein, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Bond on Appeal.

Know all men by these presents, that we, The City of Helena, a municipal corporation situated in the county of Lewis and Clarke, State of Montana, organized and existing under and by virtue of the laws of said State, as principal, and John Horsky and F. J. Edwards, residing in said city of Helena, Lewis and Clarke county, State of Montana, as sureties, are held and firmly bound unto the above-named complainant, The Helena Water Works Company, in the full and just sum of five hundred dollars, to be paid to the said Helena Water Works Company, its attorneys, successors or assigns, for which payment, well and truly to be made, we bind our-
261 selves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-second day of August, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a session of the circuit court of the United States, ninth circuit, in and for the district of Montana, in a suit pending in said court between the said Helena Water Works Company, complainant, and said City of Helena, respondent, a decree was entered against the said City of Helena, and the said City of Helena, having obtained from said court an order allowing an appeal to the United States circuit court of appeals, for the ninth circuit, to reverse the decree of the aforesaid suit, and a citation directed to the said Helena Water Works Company is about to be issued, citing and admonishing it to appear at the United States circuit court of appeals, for the ninth circuit, to be holden at San Francisco, California.

Now, the condition of the above obligation is such that if the said City of Helena shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

THE CITY OF HELENA,
By EDWARD HORSKY,
City Clerk and Attorney.
JOHN HORSKY.
F. J. EDWARDS.

262 DISTRICT OF MONTANA, } ss:
United States of America, }

F. J. Edwards and John Horsky, being duly sworn, each for himself deposes and says: That he is a resident of the State of Montana; that he is one of the sureties to the foregoing undertaking; that he is worth the sum specified therein as the penalty thereof, over and above his just debts and liabilities, and exclusive of property exempt by law from execution.

F. J. EDWARDS.
JOHN HORSKY.

Subscribed and sworn to before me this 22d day of August, A. D. 1902.

[SEAL.] CHARLES E. PEM,
Notary Public in and for Lewis and Clarke County, State of Montana.

The foregoing bond, and sufficiency of sureties on said bond, are hereby approved this 22d day of August, A. D. 1902.

HIRAM KNOWLES, *Judge.*

Due service of the foregoing instrument and receipt of a true copy thereof are hereby acknowledged and admitted this 22d day of August, 1902.

CLAYBERG & GUNN,
Solicitors for Complainant.

(Endorsed:) Title of court and cause. Bond on appeal. Filed and entered August 22d, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy clerk.

263 And thereafter, to wit, on the 22d day of August, 1902, citation duly issued, which said citation is hereto annexed:

In the Circuit Court of the United States, Ninth Circuit, in and for the State of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant, } No. 619.
vs.
THE CITY OF HELENA, Defendant. }

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Helena Water Works Company, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be

holden at the city of San Francisco, in the State of California, on the 6th day of October next, pursuant to an order allowing an appeal entered in the clerk's office of the circuit court of the United States for the district of Montana, in that certain action numbered 619, in which you, the said Helena Water Works Company,
264 are complainant and appellee, and the said City of Helena is respondent and appellant, to show cause, if any there be, why the decree rendered against the said respondent and appellant, The City of Helena, as in the said order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hiram Knowles, judge of the United States circuit court, ninth circuit, in and for the district of Montana, this 22d day of August, A. D. 1902.

HIRAM KNOWLES,
Circuit Judge.

Service of the within citation and receipt of a copy thereof are hereby acknowledged and admitted this 22d day of August, 1902.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Solicitors for The Helena Water Works Company, Complainant and Appellee.

(Endorsed:) No. 619. In the circuit court of the United States, ninth circuit, district of Montana. The Helena Water Works Company, plaintiff, *vs.* The City of Helena, defendant. Citation. Filed and entered August 22, 1902. Geo. W. Sproule, clerk. By Fred H. Drake, deputy. Toole & Bach, of counsel for defendant.

265 And thereafter, to wit, on the 23d day of August, 1902, a præcipe for transcript was filed, which is in the words and figures as follows:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant.

Præcipe for Transcript.

To the clerk of the above-entitled court:

Please prepare transcript on appeal of the answer, amendment to bill of complaint, agreement upon facts, amendment to agreement upon facts, assignment of errors, bill of complaint, bill of exceptions, bond on appeal and order approving, citation, demurrer, exceptions to decree, final decree, order overruling demurrer and plea, order as

to refiling replication, order allowing papers to be annexed to agreement upon facts, order for final decree, order allowing bill of exceptions, plea, petition for appeal and order allowing, replication, subpœna in equity, stipulation allowing amendment to bill,
266 stipulation as to agreed statement of facts as appears from the original records and files of said cause in said court.

Dated August 22d, A. D. 1902.

EDWARD HORSKY,
TOOLE & BACH, AND
R. LEE WORD,
Solicitors for Defendant.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, } ss:
District of Montana, }

I, George W. Sproule, clerk of the United States circuit court for the district of Montana, do hereby certify and return to the honorable, the United States circuit court of appeals for the ninth circuit, that the foregoing volume, consisting of 245 pages numbered consecutively from 1 to 245, is a true and correct transcript of the pleadings, process, orders, decree, agreed statement of facts and all proceedings had in said cause, and of the whole thereof, as appear from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of seventy-seven and 45-100 ($77.45) dollars, and has been paid by the appellant.

267 In witness whereof, I have hereunto set my hand and affixed the seal of the said United States circuit court for the district of Montana, at Helena, Montana, this 25th day of August, A. D. 1902.

[SEAL.]

GEO. W. SPROULE, *Clerk*,
By FREDERICK H. DRAKE,
Deputy Clerk.

(Endorsed:) No. 891. In the United States circuit court of appeals for the ninth circuit. The City of Helena, appellant, *vs.* The Helena Water Works Company, appellee. Transcript of record. Appeal from the circuit court of the United States for the district of Montana. Filed September 2, 1902. F. D. Monckton, clerk.

268 At a stated term, to wit: the October term A. D. 1902 of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco,

on Thursday the ninth day of October in the year of our Lord one thousand, nine hundred and two.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

THE CITY OF HELENA, Appellant,
—
THE HELENA WATER WORKS COMPANY, Appellee. } No. 891.

Order of Submission.

Ordered, appeal argued by Edward Horsky, Esquire, counsel for the appellant, and Milton S. Gunn, Esquire, counsel for appellee, and submitted to the court for consideration and decision, with leave to counsel for the appellant to file reply-brief within five (5) weeks from date, counsel for the appellee being granted leave to file supplemental brief.

269 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF HELENA, Appellant,
vs.
THE HELENA WATER WORKS COMPANY, Appellee. } No. 891.

Appeal from the circuit court of the United States for the district of Montana.

This action was commenced in the United States circuit court for the district of Montana, on April 12, 1901, by the Helena Water Works Company, a corporation organized and existing under the laws of the State of New Jersey, to restrain the City of Helena, in the State of Montana, from erecting, constructing, purchasing, or otherwise acquiring, a water plant and system, and from acquiring a water supply, to be owned and controlled by said city for the purpose of furnishing said city and its inhabitants, or any thereof, with water, except the water plant, system, and supply of the complainant, and from engaging in the business of furnishing said city and its inhabitants, or any thereof, with water, except in the event it acquires the plant, system, and supply of the complainant, and from incurring any indebtedness or expending any money therefor.

It is alleged in the complaint that the city of Helena is a municipal corporation, organized and existing under and by virtue of the laws of the Territory and State of Montana; that the complainant is a tax-payer in said city; and that the matter in dispute
270 exceeds in value the sum of $2000, exclusive of interest and costs. It is alleged that in January, 1890, the city council of Helena passed, adopted, and published, as by law required, ordi-

nance No. 248; that this ordinance was approved by the mayor of said city on the 15th day of January, 1899. It is further alleged that within thirty days after the passage of said ordinance the Helena Consolidated Water Company complied with all and singular the provisions and requirements of said ordinance, and that in doing so it expended a large amount of money, aggregating several hundred thousand dollars, in acquiring a water supply and a system through and by which to furnish water to said city and its inhabitants, as by said ordinance required, and that said system and supply were accepted by the City of Helena as complying with the requirements of said ordinance. The complaint sets forth the proceedings, sale, and transfer of the property by which the complainant became the owner of the water supply, plant, system, and property of the Helena Consolidated Water Company, including all rights, franchises, and privileges, granted and conferred by ordinance No. 248.

The bill further alleges, in substance, that, in the years 1899, 1900, and 1901, the City of Helena adopted certain ordinances and took certain proceedings for the purpose of acquiring a water plant and system of its own, and it is charged that the said city will engage in the business of furnishing water to the city of Helena and its inhabitants unless restrained by the court; that said ordinances and proceedings impair the obligations of the contract between the complainant and said City of Helena, in violation of section 11 of article III. of the constitution of the State of Montana, and of section 10 of article I. of the Constitution of the United States; that the property of the complainant, consisting of said water plant and system, franchise, and contract, will be confiscated and taken without
271 just compensation being first paid therefor, in violation of section 14 of article III. of the constitution of the State of Montana, and that said property will be taken without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

Ordinance No. 248, so far as its provisions are material to this case, is as follows:

"SECTION 1. There is hereby granted to the Helena Consolidated Water Company, and its successors and assigns, for the full term of twenty years from the passage hereof, the license and franchise of laying and maintaining water mains and pipes in and through all of the streets, alleys, avenues and public grounds of the city of Helena for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies, or corporations within the said city desiring to purchase the same, and to said city for fire, sewerage and other purposes, in case said city desires to purchase the same, subject, however, to the provisions of this ordinance hereinafter contained, establishing maximum rates, and generally to have and exercise all the rights, privileges, and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city if required; provided, however, that nothing herein contained shall be

so construed as to give to the said Helena Consolidated Water Company, or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys and public grounds, of said city with water mains and pipes, or the exclusive right of conveying, distributing or selling the same throughout the said city, or of furnishing the same to said city, except as hereinafter set forth.

"SEC. 2. For the purpose of laying, repairing, keeping, and maintaining such water mains and pipes there is hereby granted to said Helena Consolidated Water Company, and to its successors and assigns, the right and privilege of digging ditches and making
272 excavations in and upon any and all streets, avenues, alleys, public grounds, and thoroughfares of the city; provided, that it or they shall, without unreasonable delay, restore the same to as good condition as they were before the said excavations were made, and remove all earth, sand, rubbish, and other material.

"SEC. 3. All pipes and mains, including service pipes connected therewith, shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location in streets; and all repairs and extensions of such pipes and mains shall be done under the supervision of said street commissioner as to grade and location in streets. Nothing contained herein shall preclude said City of Helena from regarding or changing the grade of any street or streets within said city, or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting, giving or granting any franchises, rights or easements to any person or persons, corporation or corporations, whomsoever, so long as such franchises, rights and easements do not interfere with the franchises, rights and easements hereby granted. And that said Helena Consolidated Water Company must and shall look solely and exclusively to the person or persons, corporation or corporations: to whom such franchises, rights, and easements have been given by said city for any and all damages the said Helena Consolidated Water Company may sustain by reason of any interference with any of its pipes, mains or hydrants, or any exposure of the same caused by such person or persons, corporation or corporations.

"SEC. 4. The works hereby contemplated shall be so constructed and maintained as to interfere as little as possible with the property of others; and any damage resulting from said erection, construction and operation thereof, shall be repaired and paid for by the said Helena Consolidated Water Company, or its successors
273 or assigns.

"SEC. 5. It is hereby provided that in no case shall the mains and pipes laid and maintained under the provisions of this ordinance in any manner interfere with any mains or pipes legally laid in said streets so as to injure or obstruct the use thereof; nor shall such pipes or mains interfere or obstruct any sewer now in said streets, nor shall there be any interference with mains, pipes or sewers which may be hereafter authorized to be laid or constructed by or under the authority of said city of Helena by mains hereafter

laid by the said Helena Consolidated Water Company or its successors or assigns, and at all places and points in the said city where said mains and pipes approach gas mains or pipes there shall be at least six inches of earth between the same.

"SEC. 6. The said Helena Consolidated Water Company shall furnish and provide a full, ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction) and for other purposes; and such supply shall be full, ample and sufficient for the present population of said city, and for the future population of the said city as the same may be from time to time during the full term of five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use.

"SEC. 7. The pressure in pipes and mains at the level of the first floor of the courthouse of Lewis and Clarke county, in said city, and at all other points of equal height, shall be maintained at not less than sixty pounds to the square inch if reservoir works shall be used; and if the direct pressure system shall be used, sixty pounds to the square inch fire pressure, and forty pounds to the
274 square inch ordinary pressure shall be maintained at said points and all other points of equal height."

Section 8 describes the streets on which the water company shall lay mains or provide for at its own cost.

"SEC. 9. The said Helena Consolidated Water Company shall place down and connect with the twenty miles of mains herein provided for, at points to be designated by the city council, or a committee thereof, two hundred hydrants, and shall maintain said hydrants during the continuance of this contract. Said hydrants shall have double nozzles and shall be non-freezing and of the latest and most improved pattern, and all connections of such hydrants with the mains shall be of not less than four inches in diameter. Provided, that if the contractor use any system of pipes and hydrants now in said city and formerly belonging to the Helena Water Company, such hydrants need not be changed or renewed, and said council shall not change or relocate the same, but said hydrants shall be considered as having been located by the said city council or committee thereof under the provisions of this ordinance. The location of mains and hydrants to complete the twenty miles of mains, and the two hundred hydrants provided for in this ordinance, shall be made by the city council when the said water company is ready to erect the same without delay or loss to the said water company.

"SEC. 10. The said Helena Consolidated Water Company shall lay and maintain, in addition to the twenty miles of mains hereinbefore specified, such mains, of such sizes, at such times, and upon such streets as the city council shall from time to time direct, which said work shall be commenced and prosecuted to completion with diligence and without unreasonable delay, and shall place and

maintain one hydrant for each one-tenth of a mile on such additional mains, if the same shall be of the diameter of six inches or more, or if the same shall be of the diameter of less than six
275 inches, then one hydrant for each one-seventh of a mile, said hydrants to be of the pattern above specified; no hydrant to be placed on any pipe of less than four inches in diameter.

"SEC. 11. All water which may be required by said city of Helena for the use of any and all buildings owned and occupied by said city for municipal purposes, and also all water necessary for street sprinkling purposes, in said city, shall be furnished by the said Helena Consolidated Water Company without cost or charge to said city; provided, however, that in case the said city shall hereafter desire to use any water for street sprinkling purposes, the same must be taken from the mains of the said Helena Consolidated Water Company by means of stand-pipes erected at the cost and expense of said city, at such point or points as may be necessary upon the lines and mains of said company, and that said city shall not have the right to use any of the hydrants of the said company for the purpose of obtaining water for street sprinkling purposes.

"SEC. 12. In case of unavoidable accident or breakage of machinery, due time shall be given to the said Helena Consolidated Water Company to repair the damages, but it shall receive no pay from any person or corporation for any time during which it fails to furnish water for the causes in this section stated.

"SEC. 13. The works hereinbefore provided for, and the water system connected therewith, shall be completed and in readiness for the conveyance and distribution of water throughout the twenty miles of mains hereinbefore provided for, on or before the 1st day of July, 1890.

"SEC. 14. The mayor and any committee of said council of said city, or any officer or person authorized by said council, shall at all times have free access to the entire works and system of the said Helena Consolidated Water Company, for the purpose of inspecting and examining, or testing the same, or any part or portion thereof.

276 "SEC. 15. Said Helena Consolidated Water Company shall, from and after the 20th day of January, 1890, until said system is completed in accordance with the terms of this contract, furnish the said city of Helena with water for fire, sewerage and other purposes, through the hydrants included in the contract between the said City of Helena and the Helena Water Company, and the hydrants on such extensions as have been or may be ordered by the city council of said city, at the price herein provided for; but it shall not be required to complete its system for the conveyance and distribution of water through the twenty miles of mains herein provided for, before the first day of July, 1890."

Section 16 states the charges to be made for water furnished by the said water company to any persons.

"SEC. 17. The said Helena Consolidated Water Company shall make no charge for tapping mains for the connection of service pipes

therewith, except the actual cost of labor and materials required, and in no case to exceed two dollars and fifty cents for four inch mains, three dollars for six inch mains, three dollars and fifty cents for eight inch mains, four dollars for ten inch mains, and four dollars and fifty cents for twelve inch mains. Such connection shall be made at the cost of the applicant by any plumber whom he may employ, but not, however, until such applicant shall have procured a permit for such connection from the said Helena Consolidated Water Company. Provided always, that said company shall not refuse to permit connections to be made by or to sell or deliver water to any persons who shall offer to pay for the same and shall comply with the provisions of this ordinance, and with such regulations as may be from time to time prescribed by the city council of said city, and the reasonable rules and regulations of said company.

"SEC. 18. The said Helena Consolidated Water Company shall have the right to put in a stopcock on each service pipe below the
277 sidewalk near the curb, at its own proper cost and expense, and shall box the same securely and place the cover flush with the sidewalk, and may turn off the water from any premises when the water rates are not paid within fifteen days after the same shall have become due, and when said consumer has failed to comply with any reasonable rule or regulation of said company, but the said company shall not place any self-closing faucet or water bib upon any service pipe without the consent of the owner thereof.

"SEC. 19. No person or persons, excepting the mayor and fire marshal, or those acting under their authority, or the authority of the said city council, and the agents and employees of the said water company, shall meddle with or use any of the hydrants provided for in this ordinance, and any person violating this provision shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not less than five dollars nor more than fifty dollars. Said hydrants shall only be used for fire and sewerage purposes.

"SEC. 20. From and after the 20th day of January, 1890, the said Helena Consolidated Water Company shall keep and maintain in the storage reservoir formerly belonging to the Helena Water Company and commonly known as the Woolston reservoir, or in the reservoir formerly belonging to Helena Water Company and commonly known as the Hale reservoir, a depth of not less than six feet of water, and after the first day of July, 1890, shall keep and maintain in both of said reservoirs a depth of not less than six feet of water.

"SEC. 21. There is hereby appropriated out of the yearly revenues of the said city of Helena, for the use and benefit of the said Helena Consolidated Water Company, its successors and assigns, during the full term of five years from and after the 20th day of January, 1890, the following sums of money, to wit: Out of the general
278 fund of said city the sum of twenty dollars per year for each hydrant required by this ordinance to be kept and main-

tained by the said Helena Consolidated Water Company, on the twenty miles of mains provided for in this ordinance; and for the use of the water through said hydrants by said city for the purpose of sewerage, and the sum of sixteen dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purposes. Out of the fire department fund of said city the sum of eighty dollars per year for each hydrant required by this ordinance to be kept and maintained by said Helena Consolidated Water Company on the said twenty miles of mains provided for in this ordinance, and for the use of the water through said hydrants by said city for the purpose of extinguishing fires and for the fire department; and the sum of fifty-eight dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purpose. And it is hereby made the duty of said city council, during the said term of five years, to levy annual taxes under the provisions of the charter of said city authorizing the levy of taxes for general purposes and for fire department purposes sufficient in amount to provide funds to meet the appropriations hereby made. For the purpose of carrying out the provisions of this section, the mayor and city clerk are hereby authorized, upon allowance by the city council to draw warrants on the above funds for the above amounts and to pay the same unto the said Helena Consolidated Water Company, its successors or assigns, at the end of each month; provided, however, that if the said company shall fail to comply with the requirements herein contained concerning the pressure and depth of water in the reservoirs to be maintained, it shall forfeit all claims for payment for the month during which such failure occurs; and if such failure shall continue for more than three days after written notice by the city, then the said company shall pay a further forfeit of five hundred dollars per day, which said forfeit shall be paid before said com-
279 pany shall receive any further payment from said city in pursuance of the provisions of this ordinance. This provision, however, shall not apply to cases where the failure occurs through accidents, as provided in this ordinance.

"SEC. 22. In the use of water under this ordinance for the purpose of flushing sewers, said Helena Consolidated Water Company shall furnish water for such number of flushing tanks as said city council may from time to time require, but said flushing tanks shall be so set and regulated that the same will dump or discharge themselves but twice in every twenty-four hours.

"SEC. 23. Nothing contained in this ordinance shall in any manner interfere with or curtail the rights of the said Helena Consolidated Water Company to prosecute any action or maintain any claim it may have against any person or persons, corporation or corporations, which shall break, injure or destroy any hydrants or other property belonging to said company, including such damage or compensation as said company may be entitled to by reason of the loss or want of water occasioned by such break, injury or destruction of the said hydrants.

"SEC. 24. Said Helena Consolidated Water Company, or its successors or assigns, may have the right, and they are hereby given the privilege of making such reasonable rules and regulations as may be necessary for the purpose of carrying on the business of furnishing water, under the provisions of this ordinance, and for the purpose of making personal examination of the premises of an applicant for water, and of designating rates as herein established, and for the purpose of acquiring the right of access at all reasonable hours to all premises supplied with water for the purpose of designating the rates, and ascertaining whether or not such customer is wasting the water within the meaning of this ordinance; all of which rules and regulations shall be such as are authorized by law, and shall be binding upon the persons or corporations connecting with the works of said company, or taking water from the
280 mains of said company.

"SEC. 25. Within thirty days after the passage of this ordinance the said Helena Consolidated Water Company shall file with the clerk of said city an acceptance in writing for itself and for its successors and assigns, of all the terms, conditions and provisions of this ordinance, and a bond in the penal sum of $50,000, with two or more sufficient sureties to be approved by the mayor, conditioned that if the said company shall receive the sums of money herein agreed to be paid to it for the term of two years, upon its compliance with the conditions herein set forth, it will indemnify and save harmless the said city from any and all damages, costs, expenses, or liability therefor of whatsoever character, and to whomsoever the same may be due, or become created by, or in any manner arising from ordinances No. 93, approved November 22, 1886, or ordinance No. 95, approved February 13th, 1887. And this ordinance shall have no force or effect whatever except upon the filing of said acceptance and bond as herein provided; and also a relinquishment by George F. Woolston and the Helena Water Company of Salem, Ohio, from all claims against said city to the date of this contract arising from the ordinance in the section mentioned.

SEC. 26. It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample, and sufficient supply of good, pure, and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed."

To this bill of complaint the City of Helena interposed a demurrer, upon the grounds that the bill of complaint did not state facts sufficient to entitle the complainant to the relief demanded, or any relief, and that the bill was multifarious in the
281 joinder of an alleged cause of action upon a contract with an alleged cause of action as a taxpayer. The city also filed a plea to the bill, alleging the commencement and pendency of actions in the State court brought by the city prior to the filing of the bill

of complaint for the purpose of exercising, on the part of the city, the right of eminent domain in condemning certain water rights to supply the city of Helena and its inhabitants with water. The plea also alleged that prior to the filing of the bill of complaint the complainant and one Harry B. Palmer had commenced separate actions in the State court to restrain the City of Helena from auditing, allowing, or ordering paid any claim or demand against said city on account of any indebtedness incurred at any time when the indebtedness of the said city exceeded three per centum of the assessed value of the taxable property of said city, as ascertained by the last assessment for State and county taxes. Upon a hearing by the court, the demurrer and plea was overruled, and a temporary injunction issued as prayed for in the bill of complaint.

The defendant in its answer admits the material allegations of the complaint, and among others, the proceedings taken to procure a water system and supply of its own. To this answer a replication was filed, and thereupon the case was submitted to the court upon an agreed statement of facts. From this statement it appears that "the indebtedness of the defendant is now and has been for several years last past in excess of three per cent. (3 %) of the assessed value of all the taxable property in said city, as determined by the assessment for the State and county taxes during each and all of said years. That said indebtedness is now, and has been for several years last past, in excess of the sum of four hundred and eighty-six thousand dollars, and that the value of the taxable property during all of said times in said city, as determined by the assessment
282 for the State and county taxes for each of said years, does not and has not exceeded the sum of thirteen million dollars, and that no election has ever been held by the said defendant, The City of Helena, at which either the question of issuing bonds or contracting an indebtedness for a water plant, water system and water supply to be owned and controlled by said city, has been submitted to the qualified electors thereof; and that no other election upon which proceedings to allow a water plant and supply are based, has been had, except as hereinafter stated.

"That said defendant, The City of Helena, has never given the complainant notice that it desired to purchase its plant, franchise or water supply, and that no effort has ever been made by the said defendant to agree with complainant upon the terms of such a purchase to acquire the plant and water supply of complainant except as hereinafter stated in paragraphs VIII., and as follows: That during the months of September and October, 1899, pursuant to an order of the city council of said defendant city, defendant advertised for sealed proposals in the 'Helena Daily Independent,' a daily newspaper of general circulation in said city and State; and in the 'American Contractor,' a weekly publication of general circulation in the city of Chicago, State of Illinois, and throughout the United States, for sealed proposals for the 'construction and purchase of a water plant and supply,' in accordance with certain plans and specifications theretofore adopted by said city

council, said proposals to be opened on November 6th, 1899. That said plans and specifications expressly stated therein and contained the following: 'It is expressly understood that nothing herein contained shall prevent any company now operating a water plant in the city, or any other company or individual from submitting a bid for the sale of any plant now constructed, or one proposed to be constructed; upon a place different from
that herein specified; but any such company or indi-
283 vidual may submit any bid that it or he may desire, upon
any other basis, and any and all such bids will be considered by the council in connection with any and all other bids received.' And that in response to said advertisement, a proposition was received from complainant herein, through Edgerly & Crocker, by Francis M. Edwards, their agent, offering to sell to defendant the water plant and system of complainant herein for the sum of nine hundred and ninety thousand dollars. That at the time of receipt of said proposition by complainant, and the opening of bids by said city, to wit, November 6, 1899, the limit of indebtedness over and above the three per cent. limit fixed by the constitution had not yet been extended, and that thereafter, to wit, at an election of the taxpayers affected thereby, or said city of Helena, held on the 4th day of December, 1899, pursuant to an ordinance in that behalf duly passed and approved, the question was submitted to said taxpayers affected thereby, whether the limit of indebtedness should be extended ten per cent. over and above said three per cent. limit, for the purpose of procuring a water supply and system to be owned and controlled by said defendant, and which should devote the revenues derived therefrom to the payment of the debt incurred therefor; the last assessed valuation of said city theretofore for State and county taxes being the sum of ten million, seven hundred and forty thousand dollars; but that the majority of the taxpayers affected thereby, voting at said election voted 'No,' and against said proposed extension of ten per cent., and that as a result thereof, the city council of said defendant was obliged to and did reject said bid and all others received.

"That thereafter an election was held on the 18th day of January, 1900, as alleged in the complaint, at which the majority of the taxpayers affected thereby of said city voted 'Yes,' and in favor of extending the limit of indebtedness of said city five per centum, or in
amount six hundred fourteen thousand, four hundred and
284 seventy-five dollars and fifty cents over and above the three
per cent. limit, for the purpose of procuring a water supply and system to be owned and controlled by said city, and which should devote the revenue derived therefrom to the payment of the debt incurred therefor; and thereafter on the 4th day of June, 1900, by ordinance No. 477, duly passed by the city council of said defendant, and approved by the mayor on said date, said limit of indebtedness was, in accordance with said vote at said election, duly extended five per centum over and above the three per cent. limit, provided by section 6 of article XIII. of the constitution of the State

of Montana, of the total assessed valuation of the taxable property of said city as ascertained by the last assessment theretofore for the State and county taxes, to wit, five per cent. of $12,287,510; namely, $614,475.50 over and above said limit of three per cent. for the purpose of procuring a water system and supply for said city, which shall own and control the same and devote the revenues derived therefrom to the payment of the debt incurred therefor; and that thereafter, said defendant in that behalf by the city council of said city duly authorized, commencing on the 7th day of June, 1900, and ending on the 20th day of June, 1900, advertised daily for sealed proposals in the said 'Helena Daily Independent,' for a 'water supply' and also for a 'water supply and system' to be owned and controlled by said city, in accordance with certain plans and specifications therein referred to and theretofore adopted by the city council of said city; said proposals to be opened on June 25, 1900, at the regular meeting of the city council on said date. That said plans and specifications in said advertisement referred to were as hereinbefore stated. But that no bid or proposal or response of any kind whatsoever to said advertisement was made by complainant herein, or by said defendant received from complainant in response thereto.

"That the City of Helena contemplates and intends to do
285 all acts and things necessary to secure a water supply and system to be owned and controlled by the said city of Helena, and that it contemplates and intends to raise funds and revenue therefor in the manner provided by law, and to use the same for said purpose, and to furnish and supply the city of Helena and the inhabitants thereof with water from its said plant, and that it contemplates and intends to purchase and secure a sufficient quantity of water for said purpose, and that complainant does not obtain any of its water supply from either Beaver, McClellan or Prickly Pear creeks.

"That the ordinances Nos. 467 and 483 mentioned in paragraph XXVII. of the complainant's bill of complaint, were duly passed and adopted and approved, and that unless said defendant, The City of Helena, is enjoined and restrained from acquiring a water supply, plant and system, it will proceed to acquire the same under said ordinances or such others as are necessary for said purpose as hereinbefore stated, and will engage in furnishing the said defendant, The City of Helena and inhabitants with water suitable and proper for its use, and that to do so will depreciate the value of complainant's franchise and property as stated in paragraph XXVIII. of the complaint; but that no injury of which complainant can complain will result therefrom if defendant city has the rights claimed by it.

"That the facts stated in paragraphs XXIX., XXX., and XXXI. of the complainant's bill of complaint are true, except as to the legal inferences and deductions made therefrom, and the further fact that the acts complained of will not result in great and irreparable injury and damage or any damage or injury to said complain-

ant as a taxpayer or otherwise, unless it be found that the said acts are in violation of the rights of said complainant, and an unwarranted attempt to exercise powers and rights in behalf of said defendant, The City of Helena.

"It is also agreed that — an election held at said city on the
286 29th day of July, 1895, it was decided that the limit of the city's indebtedness might be extended under the constitution and laws passed in pursuance thereof by the legal voters of said city. That thereafter the city council of said city by resolution duly passed, directed the city clerk to advertise for bids for a snpply of water to be furnished, owned and controlled by said city in accordance with plans and specifications theretofore adopted, and complied with the requirements of the law in such matters as hereinabove in paragraph IV. stated. That on the 14th day of December, A. D. 1895, said The Helena Consolidated Water Company, predecessor in interest of complainant, commenced its action in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, by which it sought to enjoin the defendant from advertising and receiving bids for said purpose, and to which complaint defendant, The City of Helena, duly filed its answer; that a restraining order was duly issued and an appeal therefrom duly taken to the supreme court of the State, and by that court the said judgment so appealed from was reversed and said cause remanded with directions to said trial court to dissolve said injunction and dismiss said complaint; that thereupon a mandate duly issued and said injunction was dissolved and said complaint dismissed and judgment entered accordingly, all of which said proceedings are still in full force and effect and unreserved, and a copy of the pleadings, order for injunction, appeal, judgment and opinion of the supreme court *are* hereto attached and admitted with all the force and effect to which the same may be and are entitled.

"That said defendant, City of Helena, has made no other efforts under the allegations of paragraph XXIV. of said complaint than as herein set forth, and that it proposes and intends to construct and establish a water plant and system to be owned and possessed by
it prior to the expiration of the alleged contract and franchise
287 of complainant, at such time as in its judgment and discretion it is feasible and proper so to do; and all actions and proceedings necessary therefor instituted and maintained; and that unless enjoined and restrained from so doing it will, both before and after the expiration of said alleged contract and franchise, furnish and supply the said city and the inhabitants thereof with water. That the revenue for said purpose will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended in accordance with the requirements of the constitution and provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it has no legal or equitable right to do so on account of the facts and admissions hereinbefore stated and made.

"And it is further agreed that said ordinance No. 248 is in full

force and effect except in so far as it is or may be affected or modified by the ordinances or resolutions aforesaid."

Upon the pleadings and the agreed statement of the facts, the circuit court entered a decree, adjudging and decreeing that the City of Helena, its officers and agents, be enjoined and restrained from acquiring a water plant, system, or supply, other than the plant, system, and supply of complainant, to be owned or controlled by it, for the purpose of supplying its inhabitants, or any thereof, with water, and from furnishing or supplying said inhabitants, or any thereof, with water until after the expiration of the franchise granted to the Helena Consolidated Water Company, its successors and assigns, by ordinance No. 248 of the ordinances of said city, to wit, January 15, 1910.

From the decree of the circuit court awarding an injunction, the City of Helena appeals to this court.

288 Edward Horsky, city attorney, and R. Lee Word, and Toole & Bach, attorneys for appellant.

Carpenter & Carpenter, and Clayberg & Gunn, attorneys for appellee.

Before Gilbert, Ross, and Morrow, circuit judges.

MORROW, circuit judge, after the foregoing statement of facts, delivered the opinion of the court.

It is clear that ordinance No. 248 does not grant an exclusive franchise to the water company to supply the inhabitants of the city of Helena with water during the term of the franchise, since the contrary is expressly provided in the first section of the ordinance granting the franchise and prescribing its terms. It is there provided that "nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Company or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys, and public grounds of said city with water mains and pipes, or the exclusive right of conveying, distributing and selling the same throughout the city, or of furnishing the same to said city, except as hereinafter set forth." The meaning of this proviso is made still more definite and certain by reference to the previous language of the section making the grant of the franchise for laying and maintaining water mains and pipes for the purpose of distributing water throughout the city subject to the qualification that the water is to be sold to "all persons, bodies, or corporations within the city desiring to purchase the same," and making the general grant to have and exercise all the rights, privileges, and franchises necessary to the proper and successful furnishing of water subject to the further qual-

289 fication that the water is to be furnished "to the inhabitants of said city, if required." In other words, the ordinance grants to the water company for the term of twenty years the license and franchise for laying and maintaining water mains and pipes for the purpose of distributing water throughout the city for sale to

such purchasers as desire to obtain water from that company. But the franchise is not exclusive. The city may grant another franchise to another company to occupy the streets of the city with water mains and pipes for the purpose of conveying, distributing, and selling water to the inhabitants of the city in competition with the grantee of the franchise. This much is conceded by the appellee. But the controversy turns upon the right of the city to engage in the business of supplying the inhabitants with water in competition with the appellee during the term of the franchise. It would seem that if the city has the authority to grant a franchise to another corporation to construct and maintain a plant and system for supplying and selling water to its inhabitants, it would have the authority to construct and maintain a system for that purpose itself. The appellee contends, however, that the city has by the terms of ordinance No. 248 parted with that right during the continuance of the franchise and further, that the city is now proceeding without authority of law to procure a water plant and system of its own. These two questions appear to be the controlling questions in the case.

Whether the City of Helena is proceeding under authority of law to acquire a water plant and system to be owned and controlled by the city, involves the consideration of a provision of the constitution of the State and statutes of the State passed to carry the provision of the constitution into effect. The section of the constitution referred to is section 6 of article XIII., which provides as follows:

"No city, town, township or school district shall be allowed
290 to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the State and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township, or school district shall be void; provided, however, that the Legislative Assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the tax-payers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

It is stipulated in the agreed statement of facts that the indebtedness of the city of Helena is now and has been for several years last past in excess of three per cent. of the assessed value of all the taxable property in said city as determined by the assessment for the State and county taxes during each and all of said years. Subdivision 64 of paragraph 4800 of the Political Code of the State, relating to the legislative powers of cities and towns, as amended by the act approved March 6, 1895, extends the limit of indebtedness mentioned in the constitution, and provides that an additional indebtedness may be incurred by cities and towns incorporated under

the laws of the State, "when necessary to construct a sewerage system or procure a water supply for the said city or town, which shall own and control said water supply, and devote the revenues derived therefrom to the payment of the debt." The statute then proceeds to place a limit upon such additional indebtedness, providing that the limit of the indebtedness shall be submitted to a vote of the taxpayers affected thereby and carried in the affirmative by a vote of the majority of the
291 taxpayers who vote at such election. The statute further provides for the issue of bonds for such indebtedness, and where a water supply is being furnished by private parties, the acquisition of the plant of such parties instead of the erection or construction of a new plant. The last provision of the statute was declared unconstitutional by the supreme court of the State in Helena Consolidated Water Company v. William L. Steele, etc. 20 Montana, 1, thus disposing of that question, but the appellee objects to the remainder of the statute, on the grounds that it is a general law, whereas the constitution, it is contended, contemplated a special act adapted to the circumstances of each case. We do not think this objection can be sustained. The tendency of constitutional limitations upon legislative action is to require that no special law shall be enacted where a general law can be made applicable; and this provision we find in express terms in the constitution of Montana after an enumeration of cases where special laws are prohibited (section 26 of article V.). But it is not necessary to pursue this question further. We think the whole question whether the city is proceeding under the authority of law is covered by the agreed statement of facts. It is there stipulated "that the City of Helena contemplates and intends to do all acts and things necessary to secure a water supply and system to be owned and controlled by the said City of Helena, and that it contemplates and intends to raise funds and revenue therefor *in the manner provided by law.*" It is also stipulated "that no injury of which complainant can complain will result therefrom if defendant city has the rights claimed by it;" that the facts complained of "will not result in great and irreparable injury and damage, or any damage or injury to said complainant as a taxpayer or otherwise, unless it be found that the said acts are in violation of the rights of said complainant, and an unwarranted attempt to exercise powers and rights in behalf of said defendant, The City of Helena; that unless
292 enjoined and restrained from so doing, it (the City of Helena) will, both before and after the expiration of said alleged contract and franchise (ordinance No. 248), furnish and supply the said city and the inhabitants thereof with water; * * * that the revenue for said purpose will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended *in accordance with the requirements of the constitution and provisions of the statutes of the State of Montana in that behalf*, unless it shall be adjudged that it has no legal or

equitable right to do so on account of the facts and circumstances hereinbefore stated and made."

If these stipulations mean anything, they mean that the city is proceeding regularly under the constitution and laws of the State for the purpose of securing a water supply and system to be owned and controlled by the city, and as the stipulations appear to be in accordance with the law and the facts, they will be so construed, without further discussion.

The only remaining question necessary to be considered is, whether under ordinance No. 240 the city has entered into an implied agreement or contract with the water company that it will not engage in the business of supplying water to the inhabitants of the city in competition with the water company during the term of the franchise. Referring again to the ordinance, we find in section 3 that the city made an express reservation that nothing contained in the ordinance should constrain the city "from the construction or maintenance of sewer works or other works or plants of a public nature." What are works or plants of a public nature? Section 6 of article XIII. of the constitution of the State, relating to public indebtedness, has authorized municipal corporations, as we have seen, "to promote a supply of water for such municipality, which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

This authority clearly contemplates works or plants of a public nature to carry out the constitutional power conferred upon the municipality, and the legislative assembly, in accordance with the authority of the constitution, has not only provided, in subdivision 64 of section 4209 of the Political Code for the creation of the indebtedness for the purpose of procuring a supply of water, but has also provided in subdivision 29 of the same section that the city or town council shall have power "to adopt, enter into, and carry out means for securing the supply of water for the use of the city or town or its inhabitants." This last provision is broad enough to authorize a municipal contract with a corporation or individual to supply the water required for the municipality; but it is also broad enough to authorize the city or town council to construct and maintain a plant of its own for that purpose, and, in our opinion, it was this power and authority that was reserved in section 3 of the ordinance. We are further supported in this view of the ordinance by an examination of section 6, where it is provided that the water company shall furnish and provide a full, ample, and sufficient supply of good, pure, wholesome and clear water for the use and waste of the inhabitants of the city, and to provide the city with water for fire, sewerage (maintenance and construction), and for other purposes, and that such supply shall be full, ample, and sufficient for the present population of the city and for the future population of the city, as the same may be from time to time, "during the full term of five years." This section might properly be construed as a contract with the water company that the water company should have the exclusive right of supplying the city and its inhabitants

with water during the first five years of the franchise. It might also be construed as an implied agreement that the city would
294 not establish a plant of its own for the purpose of supplying water to its inhabitants or for its own purposes during that period. But this period of five years has long since expired, and the section now only serves to indicate that for the remaining fifteen years of the franchise there was no exclusive franchise granted to the water company, and no implied agreement that during this last period it would not engage in the business of supplying water to the inhabitants of the city or for its own municipal purposes.

It appears that the court below followed the decision of the circuit court for the western district of Missouri, in the case of Southwest Missouri Light Co. *v.* City of Joplin, 101 Fed. 33; 113 Fed. 817. It will be found, upon examination of that case, that the statute under which the municipal authorities acted was in the alternative; that is to say, the city council might, under the authority of the statute, establish gas or electric works, or light works of any kind, for the purpose of supplying the inhabitants of the city with light, or they might in their discretion grant the right to any person or corporation upon such terms as might be prescribed by ordinance, providing that such right should not extend for a longer period than twenty years. The city council, in the exercise of its discretion, adopted the latter alternative, and granted to certain persons the right to establish a light plant for the generation of electricity, for the purpose of furnishing light, heat, motor power, and other purposes, for the period of twenty years. The circuit court very properly held that the city council having adopted the alternative method of procuring light for the city and its inhabitants contemplated by the statute, it was an implied term of the contract, made by the acceptance of the ordinance, that the city could not itself enter into competition with the grantee in supplying light to consumers during the term of the grant by means of a light plant erected under the powers conferred by the statute.

295 The law under which the City of Helena acted in this case prescribed no such alternative conditions, and we certainly ought not to assume that they are to be implied; unless the implication is so plain as to be beyond all doubt; and this is not the case with respect to either the law of the State or the ordinance of the city.

Public grants are to be so strictly construed as to operate as a surrender by them of the sovereignty no farther than is expressly declared by the language employed for the purpose of their creation. The grantee takes nothing in that respect by inference. Such is deemed the legal intent of the State in imparting to its citizens or corporations powers and privileges of public character. Syracuse Water Co. *v.* City of Syracuse, 116 N. Y. 167, 178; the general doctrine is that whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation and in favor of the public, and that nothing passes but what is granted in clear and

explicit terms. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Rice *v.* Railroad Company, 1 Black. 358, 380.

In Bienville Water Supply Co. *v.* Mobile, 95 Fed. 539, 175 U. S. 109, the city of Mobile was authorized and empowered by its charter and an act of the legislature to build or otherwise acquire water works of its own to supply water to itself and its inhabitants for the extinguishment of fires and for sanitary and domestic purposes. The city, instead of building or acquiring water works of its own, entered into a contract with the Bienville Water Supply Co., by which it was agreed that the water company would furnish for the use of the city 260 fire hydrants and water for fire service of a certain number of streams and pressure; and it was further agreed that the city would have the unrestricted use of such hydrants for such fire purposes and the free use of
296 water for all municipal buildings. The water company agreed not to charge during the continuance of the contract for domestic use a greater or higher rate for water than that named and specified in the contract. The city, in consideration of the stipulations contained in the agreement on the part of the water company agreed to pay the water company for the use of the hydrants at the rate of $50 per annum for each hydrant during the continuance of the contract. It was agreed that the contract should be for six years. It was afterwards extended for a period of twelve years. Before the expiration of this contract, the city proceeded to erect water works of its own for the purpose of supplying water to its inhabitants and for its own use. The water company filed a bill in equity in the United States circuit court against the city to enjoin it from making or carrying out any other contract for supplying water to its inhabitants, or from the construction of a system of water works for that purpose during the continuance of the contract with the water company, and from building or acquiring a system of water works to bring water into the city during such contract. To this bill the city demurred. In support of the bill the water company contended that the city had no legal right to impair the value of its plant or to destroy or diminish its income therefrom, which would be the effect of the city's action in building water works and furnishing water to its inhabitants, and it was averred that the city was insolvent and that the only way complainant could protect itself was through the interposition of a court of equity. It was not asserted by the water company that it had been granted an exclusive franchise to furnish water to the city and its inhabitants, but it was contended that under the contract the city had no right to furnish water to other persons or to build or acquire a system of water works to supply water to itself and its inhabitants, and that to do this was a violation of the contract. The bill was dismissed by the
297 circuit court. In the supreme court the decree of the circuit court was affirmed, the supreme court holding that no acts were averred showing that the city was violating or intended to violate its contract with the water company.

In the case of Skaneateles Water Co. *v.* Skaneateles, 184 U. S. 354,

the franchise granted to the water company was very much of the same character as the franchise involved in this case. It was there said that "there is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed."

The principle of these last cases we think disposes of the question whether the City of Helena, has, under ordinance No. 248, parted with the right to construct and maintain a plant and system for supplying and selling water to its inhabitants, and disposes of the question in favor of the city.

The decree of the circuit court is therefore reversed, with instructions to dismiss the bill of complaint.

(Endorsed:) Opinion. Filed March 9th, 1903, F. D. Monckton, clerk.

298 United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF HELENA, Appellant,
v.
THE HELENA WATER WORKS COMPANY, Appellee. } No. 891.

Appeal from the circuit court of the United States for the district of Montana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Montana and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, reversed, with costs, and the cause remanded to said circuit court with instructions to dismiss the bill of complaint.

(Endorsed:) Decree. Filed and entered Mar. 9, 1903, F. D. Monckton, clerk.

299 United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF HELENA, Appellant,
versus
THE HELENA WATER WORKS COMPANY, Appellee.

Petition for Appeal.

The above named complainant and appellee, The Helena Water Works Company, conceiving itself aggrieved by the decision and decree of the above entitled court made and entered on the 9th day of March, A. D. 1903, reversing the decree of the United States circuit court, ninth circuit, in and for the district of Montana, in said cause, and ordering and directing a dismissal of the bill of complaint therein, does hereby petition for an appeal from said decree of this court to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herewith; and your petitioner shows that the jurisdiction of the circuit court of the United States, ninth circuit, in and for the district of Montana, was not dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States, but that in and by the bill of complaint it is alleged and claimed that a contract exists between your petitioner and The City of Helena, appellant in this court and defendant in the court below, wherein and whereby the said City of Helena agreed and contracted that it would not engage in the business of supplying the city of Helena and its inhabitants with water during the
300 term of the franchise granted to the Helena Consolidated Water Company, the predecessor in interest of your petitioner, by ordinance No. 248 of the ordinances of said city made a part of the bill of complaint as Exhibit "A," and that ordinances numbered respectively 467 and 483 and the preamble and resolution referred to in paragraph 27 of said bill of complaint as Exhibits "B," "C," and "D," respectively, impair the obligation of said concract, in violation of section 10, article I of the Constitution of the United States, all of which will more fully and at large appear by reference to a copy of said bill of complaint contained in the transcript of record on file in this court.

Wherefore, your petitioner prays that said appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decision was made and decree rendered by the above entitled court, duly authenticated, may be sent to the Supreme Court of the United States.

B. PLATT CARPENTER,
STEPHEN CARPENTER, AND
M. S. GUNN,
Solicitors for Complainant and Appellee,
The Helena Water Works Company.

It is ordered that the appeal prayed for be and the same is hereby allowed.

Dated at San Francisco, California, this 3rd day of April, A. D. 1903.

WM. B. GILBERT,
Circuit Judge.

(Endorsed:) Petition of appellee for order allowing appeal and order allowing same. Filed Apr. 6, 1903, F. D. Monckton, clerk, U. S. circuit court of appeals for the ninth circuit.

301 United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF HELENA, Appellant,
versus
THE HELENA WATER WORKS COMPANY, Appellee.

Assignment of Errors.

Comes now the above named appellee in this court, and complainant in the court below, and assigns the following errors upon which it will rely for a reversal of the decree rendered by this court in this cause on the 9th day of March, A. D. 1903, on the appeal therefrom to the Supreme Court of the United States:

1. The court erred in holding and deciding that the appellant, The City of Helena, did not, by virtue of the passage, approval and acceptance of ordinance No. 248 made a part of the bill of complaint as Exhibit "A," enter into an agreement or contract with the Helena Consolidated Water Company, its successors and assigns, that it would not engage in the business of supplying water to the inhabitants of said city in competition with the said Helena Consolidated Water Company, its successors and assigns, during the term of the franchise granted by said ordinance, to-wit, twenty years.

2. The court erred in holding and deciding that in and by section 3 of said ordinance No. 248, the right of the City of Helena to acquire a water plant, system and supply, and engage in the business of supplying water to said city and its inhabitants, is reserved.

302 3. The court erred in holding and deciding that by virtue of section 6 of said ordinance No. 248, the agreement that the city would not engage in furnishing water to its inhabitants in competition with the grantee of said franchise, its successors and assigns, was limited to the period of five years.

4. The court erred in holding and deciding that the grant to the Helena Consolidated Water Company, its successors and assigns, of the right to supply water to the city of Helena and its inhabitants, is one which should be construed strictly, for the reason and because the question of whether or not the said City of Helena has the right to acquire a water plant, system and supply, and engage in business in competition with appellee, depends upon the construc-

tion of the contract resulting from the passage, approval and acceptance of ordinance No. 248 which contract was made by the said city in the exercise of its business or proprietary powers as distinguished from its legislative or governmental powers.

5. The court erred in holding and deciding that ordinances numbered respectively 467 and 483 and the preamble and resolution attached to and made a part of the bill of complaint, as Exhibits "B," "C," and "D," respectively, do not impair the obligation of the contract resulting from the passage, approval and acceptance of said ordinance No. 248, for the reason and because by virtue of said contract the said City of Helena contracted and agreed that it would not, during the term of the franchise granted by said ordinance, acquire a water plant and supply for and engage in the business of supplying water to the inhabitants of said city, and by the passage and approval of said ordinances Nos. 467 and 483 respectively and said preamble and resolution, the contractual obligation on
303 the part of said city to desist and refrain from becoming a competitor of appellee in the business of furnishing water to the inhabitants of said city is violated.

6. The court erred in holding and deciding that because the said City of Helena has authority to grant a franchise to another corporation to construct and maintain a plant and system and supply and sell water to the inhabitants of said city in competition with appellee, the city itself can acquire a supply and plant and engage in the business of furnishing water to said inhabitants, for the reason and because said city may have a right to grant such a franchise without having the right to acquire a supply and system and engage in such business itself.

7. The court erred in holding and deciding that section 6 of article XIII of the constitution of the State of Montana does not require a special statute authorizing the City of Helena to extend the limit of its indebtedness as provided therein, but that the general law in force is sufficient for such purpose, for the reason and because said section clearly contemplates the enactment of a special law applicable to a particular city.

8. The court erred in holding and deciding that the question of the proper construction of section 6 of article XIII of the constitution of Montana is foreclosed and waived by the agreed statement of facts in said case.

9. The court erred in holding and deciding that the last provision of subdivision 64 of section 4800 of the Political Code of Montana, as amended, is in violation of the constitution of Montana, and that the question of the constitutionality thereof is disposed of by the case of Helena Consolidated Water Company *v.* Steele, 20
304 Montana page 1, for the reason and because said statute now in force was not considered in said case, and is materially different from the statute considered and held unconstitutional therein.

10. The court erred in holding and deciding that by the stipulation and agreement as to the facts the question of whether or not

the constitution and statutes of the State of Montana authorize the City of Helena to incur an indebtedness for the purpose of acquiring a water supply, plant and system, to be owned and controlled by said city, and to acquire such plant, system and supply, is foreclosed and concluded, for the reason and because by said stipulation as to the facts it is only agreed and stipulated that the City of Helena proposes to observe and follow the provisions of the law on the subject of incurring such indebtedness and acquiring such plant, system and supply, and does not purport to agree or stipulate that the said law is valid or sufficient to authorize such acts or proceedings.

Wherefore, the said The Helena Water Works Company, appellee, prays that the decree of the said circuit court of appeals of the ninth judicial circuit be reversed.

B. PLATT CARPENTER,
STEPHEN CARPENTER, AND
M. S. GUNN,
Solicitors for Appellee, The Helena Water Works Company.

(Endorsed:) Assignment of errors, Filed Apr. 6, 1903, F. D. Monckton, clerk, U. S. circuit court of appeals for the ninth circuit.

305 Know all men by these presents, that we, the Helena Water Works Company, as principal, and the United States Fidelity and Guaranty Company, a corporation of Baltimore, Md., as surety, are held and firmly bound unto the City of Helena, Montana, in the full and just sum of five hundred dollars, to be paid to the said City of Helena; for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed, with our seals and dated this 1st day of April, A. D. 1903.

Whereas, lately at a circuit court of appeals of the United States for the ninth circuit, in a suit depending in said court, between The City of Helena, appellant, and The Helena Water Works Company, appellee, a decree was rendered against the said The Helena Water Works Company, appellee, and the said The Helena Water Works Company having obtained from said court an order allowing an appeal to reverse the decree of said court in the aforesaid suit, and a citation directed to the said City of Helena citing and admonishing it to be and appear at a United States Supreme Court, to be holden at the city of Washington, in the District of Columbia, on the 20th day of May next:

Now, the condition of the above obligation is such, that if the said The Helena Water Works Company shall prosecute its appeal to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE HELENA WATER WORKS COMPANY.
By WM. A. CHISSMAN, *Manager.*
[SEAL.] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By JOHN H. ROBERTSON, *Its Attorney in Fact.*

306 *Statement.*

The United States Fidelity and Guaranty Company.

Capital paid in cash $1,650,900.00.

Total resources over $3,500,000.00.

Home office: Corner Calvert and German streets, Baltimore, Md.

At the close of business, December 31st, 1902.

Commenced business August 1st, 1896.

Assets.

Investments, stocks and bonds (market value)	$2,245,188.59
Cash on hand and in banks	177,362.78
Collateral loans	144,935.00
Real estate	116,909.56
Loans on mortgage	54,100.00
Mortgages and other collateral a/c salvage	10,000.00
Agents' balances, less commissions, fidelity and surety	189,626.73
Agents' balances, less commissions, burglary	39,404.82
Due for subscriptions, department of guaranteed attorneys	35,533.10
Advanced a/c contracts secured	182,472.86
Interest due and accrued	24,794.51
	$3,220,327.95

Liabilities.

Capital stock paid in cash	$1,650,900.00
Cash collateral deposits	187,460.15
Bills payable	80,000.00
Surplus and reserve	1,301,967.80
	$3,220,327.95

GEORGE R. CALLIS, *Secretary.*

JOHN R. BLAND, *President.*

STATE OF MARYLAND, *City of Baltimore,* } *ss:*

On this 7th day of January, 1903, before me, A. D. Patrick, a notary public in and for the city and State aforesaid, appeared John R. Bland and George R. Callis, president and secretary respectively, of the United States Fidelity and Guaranty Company, who, being

by me severally duly sworn, did depose and say that they are such officers of the said company, and that the above and foregoing is a full, true and correct statement of the assets and liabilities of
307 the said company, as they appeared upon the books of the said company on the 31st day of December, A. D. 1902.

In witness whereof, I have hereunto set my hand and official seal the day and year aforesaid.

[NOTARIAL SEAL.] A. D. PATRICK,
Notary Public.

Whereas, the United States Fidelity and Guaranty Company, a corporation duly incorporated under the laws of the State of Maryland, has deposited with me its charter or articles of incorporation and the statement required by section 3 of an act of Congress approved August 13, 1894, and entitled "An act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon;" and has satisfied me that it has authority under its charter to do the business provided for in said act, that it has a paid up capital of not less than $250,000.00 in cash or its equivalent, and that it is able to keep and perform its contracts;

Now, therefore, the said United States Fidelity and Guaranty Company, is hereby granted authority to do business under said act in said State of Maryland and is also granted authority to do business under said act beyond the limits of said State in any judicial district of the United States in which it shall first have appointed an agent conformably to the provisions of section 2 of said act.

HOLMES CONRAD,
Acting Attorney General.

Department of Justice, Washington, D. C., September 25, 1896.
[DEPARTMENT SEAL.]

308 DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *Sept.* 15, 1902.

The annexed is a true copy of an original authorization to do business, issued by the Attorney General, under the act of Congress approved August 13, 1894.

Witness my hand and the seal of the department.

[SEAL.] CECIL CLAY,
Chief Clerk.

Form of Affidavit, Acknowledgment and Justification by Guarantee or Surety Company.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

On this 1st day of April, one thousand nine hundred three (1903) before me personally came John H. Robertson, known to me to be

the attorney in fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Helena Water Works Company, as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the city of San Francisco, State of California, that he is the attorney in fact of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the
309 annexed bond (form —) of Helena Water Works Company is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as attorney in fact of said company; and that John H. Robertson is the duly authorized agent and attorney of said The United States Fidelity and Guaranty Company, to accept service of the process in the northern judicial district of the State of California, and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million five hundred thousand dollars ($1,500,000.00).

JOHN H. ROBERTSON.

Sworn to, acknowledged before me, and subscribed in my presence this 1st day of April, 1903.

F. D. MONCKTON,
[SEAL.] *Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.*

(Endorsed:) Bond on appeal. Approved April 3, 1903, Wm. B. Gilbert, United States circuit judge. Filed Apr. 6, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

310 United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF HELENA, Appellant,
v.
THE HELENA WATER WORKS COMPANY, Appellee. } No. 891.

Certificate of Clerk Circuit Court of Appeals to Transcript of Record.

I, Frank D. Monckton, clerk of the United States circuit court of appeals do hereby certify the foregoing three hundred and nine (309) pages, numbered from one (1) to three hundred and nine (309) inclusive, to be a true copy of the record, the opinion of the court, the assignment of errors, and of all proceedings in the above entitled case as the same appear of record in my office, and that the

same, together, constitute the transcript of record therein upon appeal to the Supreme Court of the United States.

Attest my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 17th day of April, A. D. 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

311 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Helena, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, District of Columbia, on the 20th day of May, 1903, pursuant to an order allowing an appeal filed in the office of the clerk of the United States circuit court of appeals for the ninth circuit, wherein The Helena Water Works Company is appellee and you are the appellant, to show cause, if any there be, why the decision and decree made and rendered against the said appellee, as in said order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, United States circuit judge and judge of the United States circuit court of appeals for the ninth circuit, this 3d day of April, A. D. 1903.

WM. B. GILBERT,
Circuit Judge.

Service of the foregoing citation admitted and receipt of copy thereof acknowledged this 11th day of April, A. D. 1903.

EDWARD HORSKY,
TOOLE AND BACH, AND
R. LEE WORD,
Solicitors for the City of Helena.

312 [Endorsed:] D. No. 891. United States circuit court of appeals for the ninth circuit. The City of Helena *vs.* The Helena Water Works Company. Citation on appeal to Supreme Court U. S. Filed Apr. 17 1903 F. D. Monckton, clerk.

Endorsed on cover: File No. 18912. U. S. circuit court of appeals, 9th circuit. Term No. 269. The Helena Water Works Company, appellant, *vs.* The City of Helena. Filed April 30, 1903. File No. 18912.

Service of the within ... admitted and receipt of copy acknowledged this 13th February ... A. D. 1904.
Edwards Wood
Edwin H. Loo
Thos. C. B.
Solicitors for ...

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

THE HELENA WATER WORKS COMPANY,
Appellant.

versus

THE CITY OF HELENA,
Appellee.

BRIEF OF APPELLANT ON MOTION TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE.

This suit was instituted in the circuit court of the United States, ninth circuit, district of Montana, by The Helent Water Works Company, a New Jersey corporation, against the City of Helena, a municipal corporation of Montana, for the purpose of obtaining an injunction restraining the said city from acquiring a water system and supply and engaging in the business of furnishing water to itself and its inhabitants in competition with appellant.

In the month of January, 1890, the city council of said City of Helena adopted, and the mayor of said city approved, Ordinance No. 248 entitled, "To provide the City of Helena and its inhabitants with a permanent water sup-

ply." A copy of this ordinance is made part of the bill as Exhibit A. (Record, pages 9 to 18). By this ordinance a franchise to construct, maintain and operate a water system in the City of Helena for the purpose of supplying said city and its inhabitants with water, for the term of twenty years was granted to the Helena Consolidated Water Company, its successors and assigns. The ordinance was accepted, and the requirements of Sec. 25 thereof with reference to furnishing a bond and a certain relinquishment were complied with. The Helena Consolidated Water Company expended several hundred thousand dollars in providing a water supply and system. The appellant is the successor of the Helena Consolidated Water Company, and has been, since the month of April, 1899, the owner and in possession of said system and supply, and engaged in furnishing water to the said city and its inhabitants. There is no question but that the appellant and its grantors and predecessors in interest have complied with said ordinance, and the same is in full force and effect. (Record p. 49).

Sec. 26 of said ordinance reads as follows:

"It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed." (Record p. 18).

In the month of December, 1899, the city council of the City of Helena adopted, and the mayor of said city approved, Ordinance No. 467, entitled: "An ordinance relating to the procurement of a water system and supply for the City of Helena, which shall own and control said sys-

tem and supply and devote the revenue derived therefrom to the payment of the debt incurred therefor, and providing for the submission to the taxpayers affected thereby of the question of extending the limit of indebtedness of said city over and above the three per cent. limit provided by Section 6 of Article XIII of the Constitution of the State of Montana, for the purpose of procuring such water system and supply." This ordinance is made Exhibit B to the bill, and is found in the record on pages 18 to 20. Pursuant to the provisions of this ordinance a notice of election was given, and the election was held on the 18th day of January, 1909, at which a majority of the voters voted in favor of the proposition to extend the limit of indebtedness for the purpose mentioned. In December, 1900, the city council adopted, and the mayor approved, Ordinance No. 483, entitled: "Amending Ordinance No. 482, authorizing the taking of all of the water and water rights of McClellan Creek, and those water rights of Prickly Pear Creek comprising the waters of said McClellan Creek, for the purpose of procuring a water supply for the City of Helena, Montana, which shall own and control the same, and authorizing the commencement of condemnation proceedings for such purpose." This ordinance is made a part of the bill as Exhibit C, and is contained in the record on pages 20 and 21. The city council also, in the month of April, 1901, adopted a preamble and resolution authorizing the purchase of certain water rights for the consideration of $30,000. This preamble and resolution is made a part of the bill as Exhibit D. (Record p. 22).

Par. 27 of the bill reads as follows:

"And your orator further shows and alleges that the said ordinances numbered respectively 467 and 483, and the preamble and resolution adopted and approved as aforesaid, impair the obligation of the contract between

your orator and said city resulting from the passage, approval and acceptance of said Ordinance No. 248, in violation of Section 11, Article III, of the constitution of the State of Montana, and Section 10, Article I, of the constitution of the United States." (Record p. 7).

Par. 29 of the bill is as follows:

"And your orator further shows that if the said defendant, the City of Helena, is not enjoined and restrained from carrying out its design and purpose of acquiring a water plant and system and supply, and from engaging in furnishing the said city and its inhabitants with water, it will, as your orator is informed, verily believes and alleges, acquire such plant, system and supply and engage in said business, thereby taking the property of your orator, consisting of the franchise granted by said ordinance No. 248, the rights and privileges conferred thereby, the contract contained therein, and the water plant, system and supply of your orator, without due process of law, and in violation of the fourteenth amendment to the constitution of the United States." (Record p. 7).

The indebtedness of the City of Helena is now and has been for several years in excess of the three per cent limit prescribed in Sec. 6 of Art. XIII of the constitution of Montana, which provides as follows:

"No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void; *Provided, however*, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said

water supply and devote the revenues derived therefrom to the payment of the debt."

Subd. 64 of Sec. 4800 of the Political Code of Montana, as amended by an act approved March 8, 1897, (Session Laws of 1897, p. 203), provides in part as follows:

"The city or town council has power:

"64. To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to-wit: erection of public buildings, construction of sewers, bridges, waterworks, lighting plants, supplying the city or town with water by contract, the purchase of fire apparatus, the construction or purchase of canals or ditches and water rights for supplying the city or town with water, and the funding of outstanding warrants and maturing bonds; provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not, at any time, exceed three per centum of the total assessed valuation of the taxable property of the city or town, as ascertained by the last assessment for State and County taxes; provided, that no money must be borrowed on bonds issued for the construction, purchasing or securing of a water plant, water system, water supply, or sewerage system, until the proposition has been submitted to the vote of the taxpayers affected thereby of the city or town and the majority vote cast in favor thereof; and, further provided, that an additional indebtedness shall be incurred, when necessary, to construct a sewerage system or procure a water supply for the said city or town which shall own or control said water supply and devote the revenue derived therefrom to the payment of the debt: The additional indebtedness authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, for the construction of a sewerage system, shall not exceed ten per centum over and above the three per cent. heretofore referred to, of the total assessed valuation of the taxable property of the city or town as ascertained by the last assessment for State and County taxes; and, provided further, that the above limit of three per centum shall not be

extended, unless the question shall have been submitted to a vote of the tax-payers affected thereby and carried in the affirmative by a vote of the majority of said tax-payers who vote at such election. It is further provided, that whenever a franchise has been granted to, or a contract made with, any person or persons, corporation or corporations, and such person or persons, corporation or corporations, in pursuance thereof, or otherwise, have established or maintained a system of water supply or have valuable water rights or a supply of water, desired by the city or town for supplying the said city or town with water, the city or town granting such franchise, or entering in such contract, or desiring such water supply, shall, by the passage of an ordinance, give notice to such person or persons, corporation or corporations, that it desires to purchase the plant and franchise and water supply of such person or persons, corporation or corporations, it shall have the right to so purchase the said plant or water supply upon such terms as the parties agree; in case they cannot agree, then the said city or town shall proceed to acquire the same under the laws relating to the taking of private property for public use; and any city or town acquiring property under the laws relating to the taking of private property for public use shall make payment to the owner or owners of the plant or water supply of the value thereof legally determined, within six months from and after final judgment is entered in the condemnation proceedings. For the purpose of providing the city or town with an adequate water supply for municipal and domestic purposes, the city or town council shall procure and appropriate water rights and title to the same and the necessary real and personal property to make said rights and supply available, by purchase, appropriation, location, condemnation or otherwise."

The city of Helena was created by a special act of the Territorial Legislature in 1881. The charter of the city conferred the following powers, among others, upon the city council: (a) "To make regulations to secure the general health of the inhabitants;" (b) "To provide the city with water, erect hydrants and pumps, build cisterns

and dig wells in the streets for the supply of engines and buckets;" (c) "To provide for the prevention and extinguishment of fires." (See charter of city approved Feb. 22, 1881; Laws of 12th Territorial Legislature, p. 112.)

The city became subject to the general municipal corporation act of the state in 1895. This act, as amended by an act approved March 8, 1897, conferred power upon the city council "To adopt, enter into, and carry out means for securing a supply of water for the use of a city or town, or its inhabitants." (See Session Laws of 1897, p. 212.)

It is alleged in the bill of complaint that the appellant and its predecessors and grantors have fully complied with ordinance No. 248. In the agreed statement of facts it is stipulated that these allegations of the bill are true, (Record p. 44) and that said ordinance is in full force and effect. (Record, p. 49.)

In addition to the claim that the ordinances and preamble complained of have the effect of impairing the obligation of the contract contained in ordinance No. 248, appellant further maintains:

1. That the said city is not authorized to incur an indebtedness for a water supply and system for the reason that the limit of its indebtedness can only be extended, as provided in Sec. 6 of Art. XIII of the constitution of Montana, by a special statute, and the general statute—subd. 64 of Sec. 4800 of the Political Code, as amended—is unauthorized and unconstitutional.

2. That the City of Helena, having granted a franchise to the Helena Consolidated Water Company, its successors and assigns, and entered into the contract evidenced by ordinance No. 248, pursuant to which the water works of appellant were established and have been maintained, the said city is precluded by the provisions of subd. 64 of sec. 4800 of the Political Code, as amended, from acquiring any

plant or supply except that now being operated by appellant.

3. That the city, having provided a "full, ample, and sufficient" supply of water for its inhabitants by contract, is without power to supply the inhabitants with water, for the reason that the only purpose which it could have by so doing would be to make a profit therefrom. The city is not authorized to engage in a business of a private nature for the sole object of gain,—at least in the absence of an express delegation of power to do so.

The appellant asserts a right to the relief demanded in the bill in the dual capacity of a taxpayer and as the successor of the Helena Consolidated Water Company to the franchise granted by, and contract contained in, ordinance 248.

The case was heard in the circuit court upon an agreed statement of facts. (Record, pages 44 to 49 inclusive.)

The circuit court rendered a decree enjoining the city "from acquiring a water plant, system or supply (other than the plant, system and supply of complainant) to be owned or controlled by it, for the purpose of supplying its inhabitants, or any thereof, with water, and from furnishing or supplying said inhabitants, or any thereof, with water until after the expiration of the franchise granted to the Helena Consolidated Water Company, its successors and assigns, by Ordinance No. 248 of the ordinances of said city, to-wit, January 15th, 1910." (Record, p. 129). Counsel for the city excepted to the decree upon the ground that the same should not restrain the city from acquiring a system and supply for furnishing water to its inhabitants, but should be limited to restraining the city from supplying water to the inhabitants during the life of the franchise. (Record, p. 130). An appeal was taken from this decree to the circuit court of appeals, where the same was re-

versed. The water company thereupon appealed to this court.

The jurisdiction of the circuit court was based upon the claim of a Federal question, and also upon the ground of diversity of citizenship of the parties.

A brief has been filed on the merits of the case in which the Federal question and the other questions presented are fully discussed.

BRIEF OF APPELLANT ON MOTION TO DISMISS OR AFFIRM.

If a Federal question is presented by the statement of complainant's case in the bill, as there exists a diversity of citizenship the jurisdiction of this court to entertain the appeal herein cannot be questioned.

American Sugar Ref. Co. v. New Orleans, 181 U. S. 277.

Nor. P. R. Co. v. Soderberg, 188 U. S. 526.

Is a Federal question presented? We submit in behalf of the appellant that by the passage and approval of ordinance No. 248 and the acceptance thereof a contract resulted by which appellee agreed that it would not engage in the business of supplying water to its inhabitants in competition with appellant during the period of twenty years, the term of such contract. We do not claim that there is any express provision of the contract to this effect, and neither do we claim, as contended by the appellee in the case of Joplin v. Southwest Missouri Light Co., 24 Sup. Ct. Rep. 43, that the city is precluded from becoming a competitor of appellant in the business of furnishing water to the inhabitants by virtue of the grant of the franchise contained in ordinance No. 248. Our contention is that by the acceptance of Ordinance No. 248 a contract was

entered into by which it was agreed that the Helena Consolidated Water Company, its successors and assigns, should, during the life of the franchise, provide and furnish all of the inhabitants of the city, whatever their number might be, with a sufficient supply of water, and convey and sell the same to them upon the terms and conditions expressed in the ordinance. (Ordinance No. 248, Sec. 2; Record, p. 18) and that by virtue of this agreement there is an implied contract or agreement on the part of the city that it will not interfere with or prevent the appellant from performing this obligation, by itself engaging in the commercial business of furnishing the inhabitants with water. In other words, we submit that by virtue of the contractual obligation on the part of appellant to furnish all of the inhabitants with water during the life of said franchise, there exists a correlative obligation on the part of said city to refrain from doing what it has contracted appellant shall do.

It is argued by counsel for the city that the contention thus made by appellant cannot be maintained, for the reason that the city was prohibited from granting an exclusive franchise, and, also, because the ordinance expressly provides that the franchise granted is not exclusive. We do not claim that the franchise granted is exclusive. What we say is that the city entered into a contract by which it ceased become a competitor of appellant in the business of supplying the inhabitants with water. Such a contract does not make the franchise exclusive. This was expressly held and decided in the case of Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

Counsel for the city also argue that the city reserved the right to install a water system of its own and furnish water to its inhabitants, by virtue of the provisions of Sec. 3 of the ordinance. This claim involves a construction of

the ordinance and a consideration of the case on its merits and consequently it cannot be determined on a motion to dismiss or affirm. The section of the ordinance referred to has reference to the control by the city over the streets, a fair construction of the language "sewer works or other works or plants of a public nature" and herein in connection with the other provisions of the ordinance, excludes the idea of water works. Again, the right of the city to occupy the streets is entirely distinct and different from the right to engage in the commercial business of furnishing water to private consumers. It may have contracted away its privilege to sell water to the citizens and still have the right to occupy the streets with pipes and mains.

The question as to whether there is an implied contract, as contended by appellant, is fully discussed in the brief on the merits on pages 10 to 19 inclusive.

* * * * *

In the case of St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, this court said: "Where ordinances are made legislative in character by the organic law of the State, and are passed in the exercise of a conferred power, the power to incorporate provisions into such legislation imposing also on the city the duty, when necessary, to provide the funds to pay a contract made by it. * * * In case of this nature, therefore, the question to be considered are these: Was there a contract, and if so, what obligations arose from it? And, have these been since legislation impairing the contract obligations?"

See also Wilmington v. Reynolds, 203 U. S. 555.

Ordinance No 248, having been accepted and acted upon, constitutes a contract.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1; Vicksburg Water Co. v. Vicksburg, 185 U. S. 70.

That the ordinance and resolution, which it is asserted

impair the obligation of the contract with appellant, are laws of the State within the meaning of the term "law" as used in Sec. 10 of Art. I of the Constitution of the United States, is firmly established by the decisions of this court.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1.
St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142.
Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685.
Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207.

* * * * *

When it appears that the Federal question is presented in good faith and is not frivolous, the motion to dismiss will be denied.

Illinois Cent. R. Co. v. Chicago, 176 U. S. 658.
Penn Mutual L. Ins. Co. v. Austin, 168 U. S. 685.

In the case of Illinois Cent. R. Co. v. City of Chicago, supra, the court said: "Without determining the effect of such ordinance, the question of whether it impairs the charter of the company, giving to that charter a broad construction, is fairly open to discussion. (Authorities cited). The claim is certainly not a fraudulent one. In determining the existence of a Federal question it is only necessary to show that it is set up in good faith and is not wholly destitute of merit."

In the case of Penn Mutual Life Insurance Co. v. Austin, supra, this court said: "But the words of the statute which empower this court to review directly the action of the circuit court are that such power shall exist wherever it is claimed on the record that a law of a state is in contravention of the Federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is, not that the bill, without color of right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally

unsound. The argument then, in effect, is that the right to a direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States, unless the claim be well founded. But it cannot be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case."

* * * * *

The fact that the circuit court of appeals decided against appellant's contention does not eliminate the Federal question from the case.

Andrews v. Andrews, 108 U. S. 300.

In this case the court said: "It was suggested at bar that this court was without jurisdiction. But it is unquestionable that rights under the Constitution of the United States were expressly and in due time asserted, and that the effect of the judgment was to deny these rights. Indeed, when the argument is analyzed, we think it is apparent that it but asserts that, as the court below committed no error in deciding the Federal controversy, therefore there is no Federal question for review. But the power to decide whether the Federal issue was rightly disposed of involves the exercise of jurisdiction. As the Federal question was not unsubstantial and frivolous, we pass to a consideration of the merits of the case."

* * * * *

What is implied in a contract has the same force as an express provision.

United States v. Babbitt, 66 U. S. 55.

An implied provision of a contract is as much protected from impairment by Sec. 10 of Art. I of the Constitution of the United States as the express provisions therefor.

Fisk v. Jefferson Police Jury, 116 U. S. 131.

Houston & T. C. R. Co. v. Texas, 177 U. S. 65.

If, then, by a proper construction of the contract contained in Ordinance No. 248, there is an implied obliga-

tion that the city will not become a competitor with appellant, as we contend, it is evident that the ordinances which stand on the same basis as subsequent state legislation impair this obligation. The question of whether or not there is an implied contract necessitates a consideration of the terms and provisions of said ordinance No. 248, and a construction and interpretation thereof. In the brief of the city on this motion (p. 9) it is said: "The whole matter is solved in the interpretation of the franchise contract."

* * * * *

A question once decided by this court is no longer a Federal question. It cannot be said, however, that the decision of the question of the impairment of the obligation of a contract by certain subsequent state legislation is a decision of the question of the impairment of the obligation of another and different contract by other subsequent state laws. That this is true is conclusively shown by the many decisions of this court in the cases in which the question of the impairment of the obligation of a contract arising from a grant by a municipality of a franchise has been considered and decided.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1.
Bienville Water supply Co. v. Mobile, 175 U. S. 109.
Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354.
Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 79.
City of Joplin v. Southwest Missouri L. Co., 24 Sup. Ct. Rep. 43.

These cases of themselves should be sufficient answer to the contention that a Federal question is not presented, or, if presented, was decided by the Joplin Case.

The circuit court decided the Federal question thus presented in favor of appellant. This appears from the fact

that the injunction granted was limited to restraining the city from acquiring a plant and supply for, and engaging in the business of furnishing water to the inhabitants. If the circuit court had decided the case upon the claim made by the complainant as a taxpayer, the injunction would also have restrained the city from acquiring the plant and supply for the purpose of furnishing itself with water. Furthermore, the city, appellee in this court and appellant in the circuit court of appeals, assigned as error on its appeal from the decree of the circuit court that the circuit court erred in holding that the said city had contracted away its right to engage in the business of furnishing water to its inhabitants. (See assignment of error No. 3, Record, p. 132). This of itself should be sufficient to establish that the claim of a Federal question is neither fictitious, fraudulent, nor frivolous.

* * * * *

It would seem that the motion to affirm is based upon the theory that the decision of this court in the case of City of Joplin v. Southwest Missouri Light Co., 24 Sup. St. Rep. 43, is decisive of the Federal question presented in the case at bar. This position overlooks the fact that the appeal to this court in the case at bar, unlike an appeal from a state supreme court, confers jurisdiction over the entire case. If the jurisdiction of the circuit court was properly invoked upon the ground of a Federal question as well as because of diversity of citizenship, the decision in the Joplin Case subsequent to the time the jurisdiction of the circuit court attached could not take away the right of appeal to this court or the jurisdiction of this court to decide the entire case. As a matter of fact, the appeal in the case at bar had been perfected many months before the Joplin Case was decided. There are many legal propositions presented in the brief of appellant on the mer-

its to be considered by this court independent of the Federal question, and for this reason the motion must be denied.

* * * * *

In conclusion, we respectfully submit that an examination of the brief on the merits will disclose that the Federal question relied on is neither fictitious, fraudulent, nor frivolous, but is meritorious, and that the circuit court of appeals erred in deciding the same against appellant.

The motion should be overruled and the case heard upon its merits.

Respectfully submitted,

B. PLATT CARPENTER,
STEPHEN CARPENTER,
M. S. GUNN,
Solicitors for Appellant.

Service of the within ... admitted and receipt of copy ... acknowledged this 13th ... February ... A. D. 19...
... Edward ...
... Edwin N. Tool
Thos. C. Bac
Solicitors for ...

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

THE HELENA WATER WORKS COMPANY,

Appellant.

versus

THE CITY OF HELENA,

Appellee.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This suit was instituted in the circuit court of the United States, ninth circuit, district of Montana, by The Helent Water Works Company, a New Jersey corporation, against the City of Helena, a municipal corporation of Montana, for the purpose of obtaining an injunction restraining the said city from acquiring a water system and supply and engaging in the business of furnishing water to itself and its inhabitants in competition with appellant.

In the month of January, 1890, the city council of said City of Helena adopted, and the mayor of said city approved, Ordinance No. 248 entitled, "To provide the City of Helena and its inhabitants with a permanent water supply." A copy of this ordinance is made part of the bill as

Exhibit A. (Record, pages 9 to 18). By this ordinance a franchise to construct, maintain and operate a water system in the City of Helena for the purpose of supplying said city and its inhabitants with water, for the term of twenty years was granted to the Helena Consolidated Water Company, its successors and assigns. The ordinance was accepted, and the requirements of Sec. 25 thereof with reference to furnishing a bond and a certain relinquishment were complied with. The Helena Consolidated Water Company expended several hundred thousand dollars in providing a water supply and system. The appellant is the successor of the Helena Consolidated Water Company, and has been, since the month of April, 1899, the owner and in possession of said system and supply, and engaged in furnishing water to the said city and its inhabitants. There is no question but that the appellant and its grantors and predecessors in interest have complied with said ordinance, and the same is in full force and effect. (Record p. 49).

Sec. 26 of said ordinance reads as follows:

"It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed." (Record p. 18).

In the month of December, 1899, the city council of the City of Helena adopted, and the mayor of said city approved, Ordinance No. 467, entitled: "An ordinance relating to the procurement of a water system and supply for the City of Helena, which shall own and control said system and supply and devote the revenue derived therefrom to the payment of the debt incurred therefor, and provid-

ing for the submission to the taxpayers affected thereby of the question of extending the limit of indebtedness of said city over and above the three per cent. limit provided by Section 6 of Article XIII of the Constitution of the State of Montana, for the purpose of procuring such water system and supply." This ordinance is made Exhibit B to the bill, and is found in the record on pages 18 to 20. Pursuant to the provisions of this ordinance a notice of election was given, and the election was held on the 18th day of January, 1900, at which a majority of the voters voted in favor of the proposition to extend the limit of indebtedness for the purpose mentioned. In December, 1900, the city council adopted, and the mayor approved, Ordinance No. 483, entitled: "Amending Ordinance No. 482, authorizing the taking of all of the water and water rights of McClellan Creek, and those water rights of Prickly Pear Creek comprising the waters of said McClellan Creek, for the purpose of procuring a water supply for the City of Helena, Montana, which shall own and control the same, and authorizing the commencement of condemnation proceedings for such purpose." This ordinance is made a part of the bill as Exhibit C, and is contained in the record on pages 20 and 21. The city council also, in the month of April, 1901, adopted a preamble and resolution authorizing the purchase of certain water rights for the consideration of $30,000. This preamble and resolution is made a part of the bill as Exhibit D. (Record p. 22).

Par. 27 of the bill reads as follows:

"And your orator further shows and alleges that the said ordinances numbered respectively 467 and 483, and the preamble and resolution adopted and approved as aforesaid, impair the obligation of the contract between your orator and said city resulting from the passage, approval and acceptance of said Ordinance No. 248, in violation of Section 11, Article III, of the constitution of the

State of Montana, and Section 10, Article I, of the constitution of the United States." (Record p. 7).

Par. 29 of the bill is as follows:

"And your orator further shows that if the said defendant, the City of Helena, is not enjoined and restrained from carrying out its design and purpose of acquiring a water plant and system and supply, and from engaging in furnishing the said city and its inhabitants with water, it will, as your orator is informed, verily believes and alleges, acquire such plant, system and supply and engage in said business, thereby taking the property of your orator, consisting of the franchise granted by said ordinance No. 248, the rights and privileges conferred thereby, the contract contained therein, and the water plant, system and supply of your orator, without due process of law, and in violation of the fourteenth amendment to the constitution of the United States." (Record p. 7).

The indebtedness of the City of Helena is now and has been for several years in excess of the three per cent limit prescribed in Sec. 6 of Art. XIII of the constitution of Montana, which provides as follows:

"No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void; *Provided, however*, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

Subd. 64 of Sec. 4800 of the Political Code of Montana,

as amended by an act approved March 8, 1897, (Session Laws of 1897, p. 203), provides in part as follows:

"The city or town council has power:

"64. To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to-wit: erection of public buildings, construction of sewers, bridges, waterworks, lighting plants, supplying the city or town with water by contract, the purchase of fire apparatus, the construction or purchase of canals or ditches and water rights for supplying the city or town with water, and the funding of outstanding warrants and maturing bonds; provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not, at any time, exceed three per centum of the total assessed valuation of the taxable property of the city or town, as ascertained by the last assessment for State and County taxes; provided, that no money must be borrowed on bonds issued for the construction, purchasing or securing of a water plant, water system, water supply, or sewerage system, until the proposition has been submitted to the vote of the taxpayers affected thereby of the city or town and the majority vote cast in favor thereof; and, further provided, that an additional indebtedness shall be incurred, when necessary, to construct a sewerage system or procure a water supply for the said city or town which shall own or control said water supply and devote the revenue derived therefrom to the payment of the debt: The additional indebtedness authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, for the construction of a sewerage system, shall not exceed ten per centum over and above the three per cent. heretofore referred to, of the total assessed valuation of the taxable property of the city or town as ascertained by the last assessment for State and County taxes; and, provided further, that the above limit of three per centum shall not be extended, unless the question shall have been submitted to a vote of the tax-payers affected thereby and carried in the affirmative by a vote of the majority of said tax-payers who vote at such election. It is further provided, that

whenever a franchise has been granted to, or a contract made with, any person or persons, corporation or corporations, and such person or persons, corporation or corporations, in pursuance thereof, or otherwise, have established or maintained a system of water supply or have valuable water rights or a supply of water, desired by the city or town for supplying the said city or town with water, the city or town granting such franchise, or entering in such contract, or desiring such water supply, shall, by the passage of an ordinance, give notice to such person or persons, corporation or corporations, that it desires to purchase the plant and franchise and water supply of such person or persons, corporation or corporations, it shall have the right to so purchase the said plant or water supply upon such terms as the parties agree; in case they cannot agree, then the said city or town shall proceed to acquire the same under the laws relating to the taking of private property for public use; and any city or town acquiring property under the laws relating to the taking of private property for public use shall make payment to the owner or owners of the plant or water supply of the value thereof legally determined, within six months from and after final judgment is entered in the condemnation proceedings. For the purpose of providing the city or town with an adequate water supply for municipal and domestic purposes, the city or town council shall procure and appropriate water rights and title to the same and the necessary real and personal property to make said rights and supply available, by purchase, appropriation, location, condemnation or otherwise."

The city of Helena was created by a special act of the Territorial Legislature in 1881. The charter of the city conferred the following powers, among others, upon the city council: (a) "To make regulations to secure the general health of the inhabitants;" (b) "To provide the city with water, erect hydrants and pumps, build cisterns and dig wells in the streets for the supply of engines and buckets;" (c) "To provide for the prevention and extin-

guishment of fires." (See charter of city approved Feb. 22, 1881; Laws of 12th Territorial Legislature, p. 112.)

The city became subject to the general municipal corporation act of the state in 1895. This act, as amended by an act approved March 8, 1897, conferred power upon the city council "To adopt, enter into, and carry out means for securing a supply of water for the use of a city or town, or its inhabitants." (See Session Laws of 1897, p. 212.)

It is alleged in the bill of complaint that the appellant and its predecessors and grantors have fully complied with ordinance No. 248. In the agreed statement of facts it is stipulated that these allegations of the bill are true, (Record p. 44) and that said ordinance is in full force and effect. (Record, p. 49.)

In addition to the claim that the ordinances ~~and preamble~~ complained of have the effect of impairing the obligation of the contract contained in ordinance No. 248, appellant further maintains:

1. That the said city is not authorized to incur an indebtedness for a water supply and system for the reason that the limit of its indebtedness can only be extended, as provided in Sec. 6 of Art. XIII of the constitution of Montana, by a special statute, and the general statute—subd. 64 of Sec. 4800 of the Political Code, as amended—is unauthorized and unconstitutional.

2. That the City of Helena, having granted a franchise to the Helena Consolidated Water Company, its successors and assigns, and entered into the contract evidenced by ordinance No. 248, pursuant to which the water works of appellant were established and have been maintained, the said city is precluded by the provisions of subd. 64 of sec. 4800 of the Political Code, as amended, from acquiring any plant or supply except that now being operated by appellant.

3. That the city, having provided a "full, ample, and sufficient" supply of water for its inhabitants by contract, is without power to supply the inhabitants with water, for the reason that the only purpose which it could have by so doing would be to make a profit therefrom. The city is not authorized to engage in a business of a private nature for the sole object of gain,—at least in the absence of an express delegation of power to do so.

The appellant asserts a right to the relief demanded in the bill in the dual capacity of a taxpayer and as the successor of the Helena Consolidated Water Company to the franchise granted by, and contract contained in, ordinance 248.

The case was heard in the circuit court upon an agreed statement of facts. (Record, pp. 44 to 49 inclusive). In this statement of facts it is stipulated "That the revenue for said purpose (the purpose of procuring a supply and system) will be created and raised by borrowing money or raising funds within the limit of indebtedness as heretofore or hereafter to be extended in accordance with the requirements of the constitution and the provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it (the city) has no legal or equitable right to do so on account of the facts and admissions hereinbefore stated and made." (Record, p. 49).

The circuit court rendered a decree enjoining the city "from acquiring a water plant, system or supply (other than the plant, system and supply of complainant) to be owned or controlled by it, for the purpose of supplying its inhabitants, or any thereof, with water, and from furnishing or supplying said inhabitants, or any thereof, with water until after the expiration of the franchise granted to the Helena Consolidated Water Company, its successors and assigns, by Ordinance No. 248 of the ordinances of said city, to-wit, January 15th, 1910." (Record, p. 129).

Counsel for the city excepted to the decree upon the ground that the same should not restrain the city from acquiring a system and supply for furnishing water to its inhabitants, but should be limited to restraining the city from supplying water to the inhabitants during the life of the franchise. (Record, p. 130). An appeal was taken from this decree to the circuit court of appeals, where the same was reversed. The water company thereupon appealed to this court.

SPECIFICATION OF ERRORS.

1. The circuit court of appeals erred in deciding that the City of Helena did not, by virtue of the passage, approval and acceptance of ordinance No. 248, enter into a contract with the Helena Consolidated Water Company, its successors and assigns, that it would not engage in the business of supplying water to the inhabitants of said city in competition with said water company, its successors and assigns, during the term of the franchise granted by said ordinance, to-wit: twenty years.

2. The said court erred in holding and deciding that sec. 6 of art. XIII of the constitution of the State of Montana does not require a special statute extending the limit of indebtedness of the City of Helena before the additional indebtedness for a water supply and system can be incurred, and that the general statute in force is sufficient for such purpose.

3. The court erred in deciding that the provision of subd. 64 of sec. 4800 of the Political Code of Montana, as amended, which requires the City of Helena to acquire the plant and supply of appellant, is in violation of the Constitution of Montana.

4. The court erred in deciding that the questions as

to whether or not the statutes of the State of Montana authorize the City of Helena to incur an indebtedness for the purpose of acquiring a water supply and system to be owned and controlled by said city, and authorize said city to acquire a system and supply other than that belonging to appellant, are foreclosed and waived by the agreed statement of facts.

5. The court erred in deciding that subd. 79 of sec. 4800 of the Political Code of Montana, as amended, confers power upon the city to acquire a system and supply and furnish water to the inhabitants.

ARGUMENT AND AUTHORITIES.

HAS THE CITY THE RIGHT TO ENGAGE IN THE BUSINESS OF SUPPLYING WATER TO ITS INHABITANTS IN COMPETITION WITH APPELLANT?

We contend that by virtue of the acceptance of ordinance No. 248, a contract resulted by which appellee agreed that it would not engage in the business of supplying water to its inhabitants during the term of said contract.

The power of the City of Helena to make such a contract cannot be controverted.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

If such contract was made, in view of the action already taken by the city and its avowed intention to become a competitor of appellant, the decree of the circuit court was proper and should have been affirmed by the circuit court of appeals.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1.
Vicksburg Water Co. v. Vicksburg, 185 U. S. 65.

We concede that the contract evidenced by ordinance No. 248 does not expressly provide that the appellee shall not engage in the business of supplying its inhabitants with

water. We do say, however, that by the contract entered into it was agreed that the Helena Consolidated Water Company, its successors and assigns, should furnish water to all the inhabitants desiring to purchase the same, for the period of twenty years, and that, as an incident thereto, there was an implied agreement that the city would not engage in such business as a competitor of appellant.

Is there such an implied contract? In considering this question, which depends upon the construction of said ordinance No. 248, it is important to understand the nature of the power by virtue of which a city is authorized to provide a supply of water for its inhabitants.

The powers of a city are divided into two classes, namely, private and public. In the exercise of its private powers it is regarded the same as a private corporation.

Dillon, Munic. Corp., Sec. 66.
Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271.
Walla Walla v. Walla Walla Water Co., 172 U. S. 1.
People v. Detroit, 28 Mich. 228.
San Francisco Gas Co. v. San Francisco, 9 Cal. 453.
Bailey v. New York, 3 Hill, 531.

In the case of Illinois Trust & Savings Bank v. Arkansas City, *supra*, the court said: "A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private—conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality."

In the opinion in the case of People v. Detroit, *supra*, Justice Cooley said on page 238: "If the authorities are examined it will be found that these powers and capacities, and the interests which are acquired under them, are usually spoken of as *private*, in contradiction to those in

which the state is concerned, and which are called *public;* thus putting these corporations, as regards all such powers, capacities and interests, substantially on the footing of private corporations."

In the case of San Francisco Gas Co. v. San Francisco, *supra,* Justice Field said on page 469: "The distinction alluded to refers to the double character of a municipal corporation; its public and political character, in which it exercises subordinate legislative powers, and its private character, in which it exercises the powers of an individual or private corporation. * * * The purchase of gas involves only the exercise of the power of a private corporation; it requires no exercise of any political power. It is as much an act of a private character as if made by a private corporation."

A city in providing its inhabitants with a supply of water exercises its private powers—sometimes termed its business or proprietary powers.

Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271.
Little Falls Elec. & W. Co. v. Little Falls, 102 Fed. 663.
Baily v. Philadelphia, 39 L. R. A. 837.
Western Savings Fund Society v. Philadelphia, 72 Am. Dec. 730.
Lynch v. City of Springfield, 54 N. E. 871.
Pike's Peak Power Co. v. Colorado Springs, 105 Fed. 1.

In the opinion in the case of Illinois Trust & Savings Bank v. Arkansas City, *supra,* the court said: "In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens."

In the case of Baily v. Philadelphia, *supra,* which involved the question of the right of the city of Philadelphia to lease its gas works and the validity of such lease, the court said: "The second proposition of the appellants is that the ordinance assumes in respect to the public lighting to delegate a public legislative power, and in respect to the private lighting to confer a monopoly on the grantee, and in both cases to bind the discretion of councils for a long term of years. It is manifest that this proposition in the use of the phrase, 'public legislative power,' comes back, as already indicated, to the contention that public lighting is a municipal duty. It is true that it is a legislative power, in the sense that it is the exercise of the will of the owner with respect to ownership of the property. If such ownership was coupled with a municipal duty, such duty could not be escaped by lease or other form of delegation. But the gas works, as already discussed, are held by the city as a business corporation. * * *

"It is further argued that the lease undertakes to bind the discretion of councils for a long term of years. This again comes back to the contention that lighting the city is a strictly municipal or governmental function, as to which councils cannot bind their successors. But, as already held, the city is acting in its business capacity only, and the contract binds it in that capacity."

In the case of Western Savings Fund Society v. Philadelphia, *supra,* the court said: "But the contracts which a municipal corporation may make for the purpose of supplying the inhabitants with gas light in their streets and houses relate to the 'things of commerce,' as distinguished in the civil law from the 'things public,' which are regulated by the sovereign. Such contracts are not made by the municipal corporation, by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gas light is no more a duty of sovereignty

than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it."

See also

Lynch v. City of Springfield, 54 N. E. 871.
Aldrich v. Tripp, 23 Am. Rep. 434.
White v. Meadville, 34 L. R. A. 567.

The fact that the right to furnish water to the inhabitants of a city is one which may be conferred upon an individual or private corporation is sufficient of itself to show that the right is not a public or governmental right. The right to exercise a public or governmental power cannot be delegated.

As a city acts in its private, proprietary, or business character or capacity in providing a supply of water for its inhabitants, it follows that the exercise of the power to provide such a supply is a right or privilege, and not a duty. As was said by the court in the case of Baily v. Philadelphia, *supra*: "The gas works are the property of the city of Philadelphia, not as a municipality, but as a business corporation. However much the idea that the city is not required by its municipal duty to supply its citizens with light in the streets and public places may seem to fall below the modern conception of a city, yet it it is beyond question, on settled legal principles, that in the performance of that function the city acts under authority merely, and not under municipal obligation. This was the rule of the common law, and no statute in reference to the city of Philadelphia has altered it. Hence the

city may change its mode of action, or cease to act altogether, in its discretion, and the discretion is purely legislative. The courts have no power to interfere unless the proposed action contravenes some express statute or violates some binding contract. These principles are elementary, and need not be enlarged upon since they are conceded by the learned counsel for appellants."

In the construction of contracts made with a municipal corporation in the exercise of its private, proprietary, or business powers, the same rules apply as in the construction of a contract with an individual or private corporation.

Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271.

Little Falls Elec. & W. Co. v. Little Falls, 102 Fed. 663.

San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

In the opinion in the case of Huidekoper's Lessee v. Douglass, 3 Cranch, 1, Chief Justice Marshall, on page 70, said: "This is a contract; and although a state is a party, it ought to be construed according to those well established principles which regulate contracts generally."

Sec. 26 of the ordinance reads as follows: *"It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample, and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed."* (Record, p. 18).

In the lower courts, counsel for the city admitted that there was a contractual obligation on the part of the Helena Consolidated Water Company, its successors and as-

signs, to supply water to the inhabitants, but it was claimed that such obligation was limited to the period of five years, by virtue of the provisions of sec. 6 of the ordinance. The circuit court of appeals seems to have adopted this view. (Record, pp. 155 and 156).

WHAT IS THE TERM OF THE AGREEMENT REFERRED TO IN SEC. 26?

The title of the ordinance is: "To provide the City of Helena and its inhabitants with a *permanent* water supply." (Record, p. 9). The word "permanent" is significant of the intention of the city with reference to the term of the contract. It is recited in the ordinance that the City of Helena advertised for proposals for a water supply for the use of said city and the inhabitants thereof, and that the contract was awarded to the Helena Consolidated Water Company as assignee and successor of George F. Woolston, who was the lowest responsible bidder. The grant made by the first and second sections of the ordinance was for the purpose of enabling the Helena Consolidated Water Company, its successors and assigns, to perform the contract, and the term of the grant is necessarily the term of the contract.

In section 6 of the ordinance it is provided: "The said Helena Consolidated Water Company shall furnish and provide a full, ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction), and for other purposes; and such supply shall be full, ample and sufficient for the present population of said city, and for the future population of the said city as the same may be from time to time during the full term of

five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use." (Record, p. 11).

It will be noticed that this section has reference to the supply for both the city and its inhabitants. The words "such supply" contained in the second clause refer to the supply mentioned in the first clause. The provision that "such supply shall be full, ample and sufficient for the present population of the said city, and for the future population of the said city as the same may be from time to time during the full term of five years," relates solely to the extent of the supply, and not to the time for which the supply should be furnished. That this is the correct construction of this section is clearly evidenced by sections 17 and 26 of the ordinance.

The parties might have provided that the supply for the *city* and its *inhabitants* should be sufficient for a population of fifty thousand or any other number, instead of providing that such supply should be sufficient for the population during a given period. If provision had been made for a supply for the city and its inhabitants sufficient for a certain population in lieu of the stipulation actually made, there could be no controversy in regard to the term of the agreement to supply the inhabitants. When, therefore, we consider the purpose of the clause in said section 6, which is not only evidenced by the language thereof, but by the other provisions of the ordinance, it cannot with any degree of reason be said to determine the term of the contract or agreement mentioned in sec. 26. It could with as much reason be said that the provision of sec. 26, with reference to the quality of the water, was only operative for a period of five years, because of section 6, as to say that the requirement to furnish water to all of the inhab-

itants was limited to that period on account of said section.

The city contracted by the ordinance to take and pay for water for the period of five years. It did not have the power to contract that the inhabitants would purchase water for any period. It did have the authority, however, to provide a supply of water for the inhabitants, and contract that such supply should be sufficient for the full term of twenty years. It might have contracted that both the supply for the city and its inhabitants should be sufficient during the life of the franchise, but it did not do so. The object of section 6 of the ordinance was to insure a supply for both the city and the inhabitants during the period for which said city had contracted to take a supply, whereas, the purpose of section 26 was to make provision for a supply for the inhabitants independent of a supply for the city during the entire "term of the agreement." In section 6 the supply for the inhabitants is limited to the population of the city during the period of five years; while in section 26 the language "all of the inhabitants, whatever their number may be, at all times during the term of such agreement" is used. By reading sections 6 and 26 together and giving effect to all of the language of both sections, the intent to contract for a supply for the inhabitants during the life of the franchise is plain.

Section 1 of the ordinance contains the grant of a franchise for the full term of twenty years, subject to the provisions of the ordinance contained in section 16, establishing maximum rates. When the grant was accepted a contract resulted by which the city was prevented from reducing the rates fixed, and the grantee was prohibited from charging more for water than the maximum rates established. We have then a contract in this particular the term of which is necessarily the life of the franchise.

The provisions of the ordinance relating to the pressure

to be maintained (Sec. 7, Record, p. 11), requiring the laying of such additional mains as the city council might order (Sec. 10, Record, p. 13); providing for the furnishing of all water required by the city for the use of any and all buildings owned and occupied by it for municipal purposes, and all water necessary for street sprinkling purposes, free of charge (Sec. 11, Record, pp. 13, 14); conferring the right upon the mayor or any committee of the city council to have access to the entire works and system of the Helena Consolidated Water Company, and the right to test and inspect the same (Sec. 14, Record, p. 14); requiring the keeping and maintaining of a certain depth of water in the reservoirs (Sec. 22, Record, p. 17); each and all impose contractual duties and obligations to be performed in connection with the exercise of the franchise granted, and are necessarily operative during the life of the franchise.

Turning to sec. 17 of the ordinance we find it provided therein "that said company shall not refuse to permit connections to be made by or to sell or deliver water to any persons who shall offer to pay for the same, and shall comply with the provisions of this ordinance, and with such regulations as may be from time to time prescribed by the city council of said city, and the reasonable rules and regulations of said company." This provision imposed upon the grantee of the privilege and franchise, granted by sec. 1 of the ordinance, its successors and assigns, the duty and obligation of selling water to all persons, and does not state any time within which such obligation should be in force. It is not reasonable to suppose that it was the intention of the parties that the obligation imposed by sec. 17 should continue only for the period of five years, when the privilege or franchise in the exercise of which the obligation was to be performed was granted for the term of 20 years.

In sec. 26 the words "of the essence of the agreement and

the acceptance hereof" referred to ordinance No. 248. Such "agreement" and the words "term of the agreement" mean the term of the agreement mentioned in sec. 1 of the ordinance. This is plain when it is observed that there are a large number of special provisions in the ordinance to which attention has been called, and that all combined form the "agreement" entered into by the acceptance of the ordinance. Therefore the words "term of such agreement," in sec. 26, cannot be limited to apply only to the particular provision contained in any one section of the ordinance, for it conclusively follows from many of the sections that the obligations and duties imposed upon the grantee of the franchise, its successors and assigns, were to continue for twenty years, and that the agreement resulting from the acceptance of the ordinance was to be in force for that time. Sec. 1 of the ordinance, however, definitely fixes the term of the agreement, and neither sec. 6 nor any other section of the ordinance has changed it.

Manifestly, sec. 26 was framed after the preceding sections had been prepared as a complete ordinance, and was intended to remove any doubt that water should be provided to the inhabitants during the life of the franchise, to-wit, twenty years.

To give to sec. 26 the construction contended for in behalf of appellee and adopted by the circuit court of appeals renders the same nugatory. In other words, if the contractual obligation to furnish water to the inhabitants of the city is limited to the term of five years, as this obligation is imposed by sec. 6, there was no occasion for incorporating sec. 26 in the ordinance. The construction we contend for makes sec. 26 operative and consistent with sec. 6 and every other provision of the ordinance. It is a rule of construction of contracts and statutes that such a construction should be adopted, if reasonable, as will give effect to every part.

It is undoubtedly true that complainant is under obligation to furnish water to the city and its inhabitants without discrimination, independent of any express contract, so long as it exercises the license or permit to occupy the streets, and continues to operate its plant. By the authorities it is said that the obligation arises from an implied condition attaching to the grant of the franchise, and also from the fact that the property employed in the exercise of the franchise is devoted to the public use and is affected with a public interest. Notwithstanding this obligation, however, there is no duty devolving upon complainant, independent of contract, to continue the business of furnishing water. Unless the complainant has contracted not to do so, it has the right to remove its pipes and mains from the streets and abandon the operation of its plant at any time.

San Antonio Street Ry. Co. v. State, 35 L. R. A. 662.
State v. Helena Power & Light Co., 22 Mont. 391.
York & N. Midland Ry. Co. v. Queen, 1 E. & B. 856.
Nor Pac. R. R. Co. v. Washington, 142 U. S. 492.
Baily v. Philadelphia, 39 L. R. A. 837.

In the absence of a contract the grantee of the franchise could not be required to furnish water to the city, free of charge, for the purposes provided in Sec. 11 of the Ordinance. There are many other obligations imposed upon the grantee of the franchise, its successors and assigns, by the ordinance, which would not exist except for the contract.

When we consider that the intention and object of the city was to provide a permanent supply of water for itself and its inhabitants by contract, as shown by the title of and recitals in the ordinance; that the franchise was granted for the purpose of enabling the grantee, its successors and assigns, to perform the contract, and that a supply of

water during the life of the franchise could only be insured by contract; it is idle to contend that the term of the agreement mentioned in Section 26 of the Ordinance is different from the term of the franchise.

In the opinion of the judge of the district court of Lewis and Clarke County, Montana, in a proceeding involving a construction of said ordinance 248, which opinion is found in the record at page 100, it is said: "On January 15th, 1890, an ordinance was adopted by the City of Helena and accepted by the company, pursuant to the terms of which the latter was to furnish all of the inhabitants of Helena with water at certain prescribed rates for 20 years; and for the first five years of said period the city itself for city purposes, if it should desire to purchase water from the company."

We therefore submit that the term of the agreement mentioned in sec. 26 of the ordinance is twenty years—the life of the franchise—and that the contractual obligation to furnish water to all of the inhabitants of the city will remain in full force until the expiration of the franchise in the month of January, 1910.

WHAT IS THE EFFECT OF THE CONTRACT TO SUPPLY ALL OF THE INHABITANTS OF THE CITY WITH WATER ON THE RIGHT OF THE CITY TO BECOME A COMPETITOR OF APPELLANT?

In view of the decision of this court in the Walla Walla Case, 172 U. S. 1, the only question to be determined on this branch of the case is whether or not the contract is to be so construed and interpreted as to preclude the city from furnishing its inhabitants with water in competition with appellant. Counsel for the city maintain that the contract cannot be so construed, for the reason that the fran-

chise granted to the Helena Consolidated Water Company is not exclusive, and because the contract does not contain an express provision prohibiting the city from acquiring a plant and supply, or engaging in furnishing water in competition with appellant. It is said by counsel for the city that the Walla Walla Case is distinguishable from the case before the court because of the express provision in the ordinance considered in that case, to the effect that the city of Walla Walla would not erect, maintain, or become interested in any water works, except those provided for by the ordinance. We submit, however, that the decision in that case would not have been different if this express provision had been omitted from the ordinance.

In Sec. 7 of the ordinance considered in the Walla Walla Case it was provided:

"For all the purposes above enumerated said Walla Walla Water Company shall furnish an ample supply of water, and for domestic purposes, including sprinkling lawns, shall furnish an ample supply of good wholesome water, at reasonable rates, to consumers at all times during the said period of twenty-five (25) years."

In the opinion of the court it is said:

"The argument of the city is that the council exceeded its powers in authorizing the contract with the water company for a continuous supply of water and the payment of rentals for 25 years, and that such contract was specially obnoxious in its stipulation that the city should not construct waterworks of its own during the life of the contract. The several objections to the contract are specifically stated by counsel for the city in their brief as follows:

"(a). The contract creates a monopoly, which, in the absence of an express grant from the legislature of power so to do, or such power necessarily implied, is void as in contravention of public policy;

"(b). The contract is void as an attempt to contract away a part of the governmental power of the city council."

In considering the objection made to the provision that the city would not erect waterworks of its own during the life of the contract, the court said:

"6. Nor do we think the contract objectionable in its stipulation that the city would not erect waterworks of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect waterworks of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn, and pay for the waterworks of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That, if the city should desire to establish waterworks of its own, it would do so by condemning the property of the company, and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. *As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.*

"An agreement of this kind was a natural incident to the main purpose of the contract,—to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding 25 years. In establishing a system of waterworks the company would necessarily incur a large expense, in the construction of the power house and the laying of its pipes through the streets; and, as the life of the contract was limited to 25 years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less sub-

ject, the city might resolve to enter the field itself—a field in which it undoubtedly would have become the master —and practically extinguish the rights it had already granted to the company. *We think a disclaimer of this kind was within the fair intendment of the contract,* and that a stipulation to that effect was such a one as the city might lawfully make, as an incident of the principal undertaking.

"Cases are not infrequent where, under a general power to cause the streets of a city to be lighted, or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations *designed to do little more than bind the city to carry out the contract in good faith and with decent regard for the rights of the other party.*" (The italics are ours).

It thus appears that the court considered this stipulation in the contract as "little more than an agreement that the city would carry out the contract in good faith;" as "a natural incident to the main purpose of the contract;" as "within the fair intendment of the contract;" and as "an incident to the principal undertaking."

What was the main purpose of the contract in the Walla Walla Case? Clearly to provide a supply of water for the city and its inhabitants. What was the principal undertaking? The undertaking on the part of the company to furnish a supply as provided in Section 7 of the ordinance.

It was held in the Walla Walla Case that the fact that the city was precluded from acquiring a supply and system of its own, except as provided in the ordinance, did not make the franchise granted to the water company an exclusive one, or create a monopoly.

Although there is not in the contract contained in ordinance No. 248, a provision that the city may acquire by

condemnation the plant and supply of complainant, as in the ordinance involved in the Walla Walla Case, nevertheless, it has such right under the law, provided it is authorized to incur an indebtedness therefor.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685.

The case of Bienville Water Supply Co. v. City of Mobile, 95 Fed. 539, involved the question of the right of the complainant to an injunction restraining the city of Mobile from acquiring a system of waterworks and furnishing the city and its inhabitants with water. Judge Toulmin, in his opinion in the case, said:

"The equity of this claim depends, in my judgment, upon two inquiries:

First, whether the defendant contracted with the complainant to furnish water to the inhabitants of the city of Mobile, or gave it the right to do so during the continuance of the contract; and second, whether the defendant covenanted with the complainant not to build or acquire waterworks of its own during the continuance of said contract.

"The city of Mobile granted to complainant no rights or privileges whatever. The legislature of the state granted it the right to build waterworks, and to use the streets of the city of Mobile for laying pipes, mains, etc., for water purposes, and, among other things, authorized it and the city of Mobile to contract together for supplying said city with water. They made a contract, but there is no provision in it for furnishing the inhabitants of Mobile with water, and no stipulation on the part of the complainant to do so; but it is clear that the parties contemplated that the complainant would contract with inhabitants of the city to supply them with water for domestic purposes, for it is stipulated in their contract that the complainant shall not charge for water supplied for domestic purposes higher rates than those specified in the contract. It did not fix rates to be charged the inhabitants of the city for water, but stipulated only for a maximum rate to be charged. * *

"We have seen that it does not attempt to grant any exclusive right to the complainant, *and that it contains no provision that the complainant shall furnish water to the inhabitants of the city of Mobile,* and no covenant by the city that it will not build or acquire waterworks of its own, or abstain from supplying water to its inhabitants, during the continuance of the contract. The parties might have made such a contract, but they did not do so." (We have italicized).

The franchise in the Bienville Case was not granted by the city, as in the case at bar. The city did not contract for a supply for the inhabitants, nor give the company the right to furnish water to the inhabitants. The franchise was granted directly by the legislature, and the city made a contract for a supply for itself. If the city had contracted for a supply for the inhabitants, or had conferred upon the company the right to furnish water to the inhabitants, or the contract had contained an express provision precluding the city from acquiring its own supply and plant, then a case entitling the complainant to the relief demanded would have been presented. There was no contract whatever between the city of Mobile and the company with reference to furnishing water to the inhabitants, except a contract fixing the rates in the event the company should furnish water to the inhabitants.

An appeal was taken in the case to this court; 175 U. S. 109. In the opinion of the court it is said:

"The circuit court observed that the city of Mobile granted complainant no rights or privileges whatever, but that the legislature of the state granted it the right to build waterworks and to use the streets of the city for water purposes, and authorized complainant and the city to contract together for the purpose of supplying the city with water. *The contract was made, but there was no express provision in it for furnishing the inhabitants with water, and no stipulation by complainant that it would do so,* though it was clear that the parties contemplated that complainant

would contract with the inhabitants to supply them with water for domestic purposes, since it was stipulated that complainant should not charge for water so supplied higher rates than those specified therein. On the other hand, the city was authorized and empowered by its charter and the act of the legislature of November 30, 1898, to build or otherwise acquire waterworks of its own to supply water to itself and its inhabitants for the extinguishment of fires and for sanitary and domestic purposes, and the city in its contracts with complainant did not agree not to do so. It did agree to pay complainant for a certain number of hydrants erected and supplied by it, and to make the payments monthly, but there was no averment that the city had by act or word repudiated its obligation, or failed or refused to make the payments stipulated for, or that it intended to do so." (The italicizing is by us).

It thus appears that this court based its decision upon the following facts:

1. The contract did not provide for furnishing water to the inhabitants of the city.

2. There was no provision precluding the city from acquiring its own waterworks and supply.

When a franchise is granted to construct a street railway, it is contemplated by the parties that the railroad will be constructed and operated. If, however, there is no provision obligating the company to operate the road, the grant amounts to a mere license.

> State ex rel Knight v. H. P. & L. Co., 22 Mont. 391. See also President, etc., v. Canandaigua, 96 Fed. 449.

We therefore submit that the case of Bienville Water Supply Co. v. Mobile, when taken in connection with the Walla Walla case, clearly affirms the doctrine that where a city enters into a contract by which it contracts for a supply of water for its inhaibtants, or confers the right to furnish water to the inhabitants, the city is precluded from acquiring its own supply and system, and engaging in

the business of furnishing water to the inhabitants, in competition with the person or company with whom it has contracted.

The case of Skaneateles Water Works Co. v. Skaneateles, 184 U. S. 354, is relied upon by counsel for appellee. The facts in this case clearly distinguish it from the case before the court. In the opinion it is said:

"The contract to which reference is made is not the one which was entered into in 1891 between these parties for the term of five years, because that contract was fully carried out and had expired by its own limitation in February, 1896, but it is the contract which the plaintiff in error claims was implied by reason of its organization and incorporation in 1887, in pursuance of an application made to, and with the consent of the village authorities, and under the provisions of chapter 737 of the Laws of New York of 1873, and the acts amendatory thereof."

It is also said:

"Having before it the above act of 1873, amended in 1877, the court of appeals, in People ex rel. Mills Waterworks Co. v. Forrest, 97 N. Y. 97, 100, decided in 1884, said that 'the state authorized the formation of waterworks companies in its towns and villages (Laws of 1877, chap. 171), but it does not require one so organized to supply water to the town or village, nor does it require the town or village to take its supply of water from the company so formed.'"

The court further says:

"Now, while the parties are prohibited from contracting for more than five years without a vote of the electors, which was not taken, how can it be said that when they contracted only for the time permitted by the legislature, there was nevetheless an implied contract that the village would never avail itself of the right provided by statute, without purchasing or condemning the property of the plaintiff? No such condition is stated in any statute. We cannot see any solid foundation for the claim that there was a final and conclusive election of methods by the vil-

lage, out of which sprang the implied contract contended for, when the legislature at that very time prohibited a contract for more than five years. * * * We can appreciate the argument that the village had no right to build and use its own plant during the running of the five years' contract, but we fail to see the force of the claim that, on account of once making a contract with the plaintiff for five years, the village irrevocably bound itself by an implied contract never to build its own plant without taking by condemnation the property of the plaintiff if the parties could not agree on terms of purchase."

We find then that the village merely gave its consent as provided in the Act of 1873, and afterwards made a contract for a supply of water, the term of which was limited to a period of five years. After this contract had expired, there was no obligation to furnish water imposed by any contract between the water company and the village. If there had been such an obligation, it is apparent from the language used in the opinion that the right claimed by the city would have been denied.

In the case of Joplin v. Southwest Missouri Light Co., 24 Sup. Ct. Rep. 43, it was claimed by the light company that by virtue of the grant of the franchise the city had precluded itself from engaging in the business of furnishing light to the inhabitants. In other words, the same contention was made as in the Skaneateles Case, 184 U. S. 354; and in the Bienville Case, 175 U. S. 109. There was no pretense of any contract whereby the light company had obligated itself to furnish light to the inhabitants of the city of Joplin. The proposition presented was with reference to the construction of the grant of the franchise, and did not involve the question of the construction of any contract such as that involved in the case at bar. The case was controlled by the decisions in the Bienville and Skaneateles Cases.

As we have already shown, a municipal corporation in

providing a supply of water for itself and its inhabitants exercises its private or business power. The right of the municipality to furnish such supply itself is a privilege and not a duty. The right to exercise such a privilege can be contracted away. In every case where the right of the municipality to engage in the business of furnishing its inhabitants with water is asserted and denied the material inquiry is whether or not a contract has been entered into by which it is agreed that the privilege would not be exercised. Where there is no contract, as in the Skaneateles Case, it of course follows that the privilege remains with the municipality.

In neither the Bienville, Skaneateles, nor Joplin Case, did the ordinance considered contain a provision imposing the contractual obligation to serve the inhabitants, and it is this fact which distinguishes these cases from the case at bar. In the ordinance involved in the Walla Walla Case it was provided in sec. 7 that the water company should furnish water to consumers at all times during the period of twenty-five years. It was this provision of the ordinance which called forth the expressions of this court that the agreement that city would not engage in business in competition with the water company "was little more than an agreement that the city would carry out the contract in good faith;" "was a natural incident to the main purpose of the contract;" "was within the fair intendment of the contract;" and "was incident to the principal undertaking."

Par 9 of the bill of complaint in the case before the court reads as follows:

"That in complying with the terms, conditions, and provisions of said ordinance and contract the said Helena Consolidated Water Company expended a large amount of money, aggregating several hundred thousand dollars, in acquiring a water supply and system through and by

which to furnish water to said city and its inhabitants, as by said ordinance required, which said system and supply was accepted by said defendant as complying with the requirements of said Ordinance No. 248." (Record, p. 2.)

The truth of these allegations is admitted. (Record, p. 30.) It is a cardinal rule in the construction of all contracts that the intention of the parties, when ascertained, shall control. In determining the intention of the parties to the contract under consideration, the facts alleged in paragraph 9 of the bill, and which are admitted, are very material. As said in the opinion in the Walla Walla Case:

"It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself,—a field in which it undoubtedly would have become the master,—and practically extinguish the rights it had already granted to the company."

See also on this branch of the case:

Westerly Water Works Co. v. Westerly, 75 Fed. 181.

White v. Meadville, 35 Atl. 695.

In the case at bar it is not reasonable to suppose that the Helena Consolidated Water Company would have entered into a contract to supply water to all of the inhabitants of the city of Helena desiring to purchase the same, during the full term of twenty years, which involved an expenditure of hundreds of thousands of dollars with no opportunity for a return of its investment except from the consumers of water, unless there was an implied understanding and agreement that the city would not take away the benefits to be realized from such contract. If the position of the city is correct, it can install a system in the thickly populated and business portions of the city where

the earnings are large in proportion to the construction and maintenance cost of the system in such parts of the city, and demand of the appellant that it shall perform its contractual obligation of furnishing water in the outlying districts where there are but few consumers along each street. Neither can it be supposed that the parties to the contract would have stipulated for maximum rates, as in sec. 16 of the ordinance, (Record, p. 14), if it had been understood that the city itself might engage in the business of furnishing water. If the city can become a competitor of appellant, it might and probably would prevent the appellant from performing its contractual obligation to furnish water to anyone desiring to purchase, at the rate specified in the ordinance. The business of the appellant might and probably would be curtailed to such an extent that it would be impossible for it to realize sufficient money from those to whom it would furnish water to enable it to continue the operation of its plant and thereby perform its contract. This certainly was not the intention of the parties when ordinance No. 248 became operative. As we have already shown, if the city had merely granted a license or franchise to occupy the streets, and had not made such a contract as that evidenced by ordinance No. 248, the appellant could at any time discontinue its business, which it cannot do by reason of the contract made.

In the case of U. S. v. Babbit, 66 U. S. 55 the court said:

"What is implied in a statute, pleading, contract, or will, is as much a part of it as what is expressed."

In the case of Manistee Iron Works Co. v. Shores Lumber Co. 65 N. W. 863, the court said:

"It is a well known rule of law that every contract must be construed as if those terms which the law will imply were expressly introduced into it; that, where a contract is so framed that it binds the party contracting to do the act,

it will imply a correlative obligation on the party to do what is necessary on his part to enable the party so contracting to fulfill his part of the contract."

See also Canal Co. v. Coal Co. 8 Wall. 288.
Churchward v. Reg., L. R. 1 Q. B. 195.
Coghlan v. Stetson, 19 Fed. 727.
St. Louis Co. v. Tierney, 5 Colo., 582.

In the case at bar, if the city is permitted to acquire a plant and supply, and furnish water to the inhabitants of the city, it will thereby deprive the appellant of the right, and prevent it from earning the money with which, to perform its obligation to furnish and sell water to the inhabitants of the city imposed by the contract, contained in Ordinance No. 248. Under such circumstances, in view of the rule announced by the foregoing authorities, the correlative obligation on the part of the city to refrain from doing anything which will interfere with or prevent the performance by appellant of the obligation to furnish and sell water to the inhabitants of the city is clearly implied.

Assuming that the city had the power at the time of the passage and approval of Ordinance No. 248 to acquire a water plant and supply to be owned and controlled by itself, and also to enter into a contract with others for a supply for itself and its inhabitants, having made a contract with the Helena Consolidated Water Company for a supply its power was exhausted, and it cannot acquire a plant and supply during the life of such contract. In other words, it could not adopt both methods, and the adoption of one precluded the adoption of the other.

White v. Meadville, 35 Atl. 695.

Counsel for appellee argued in the lower courts that the ordinance does not impose any obligation upon the City of Helena or its inhabitants to purchase water from appellant. Attention was called to the language of the first sec-

tion of the ordinance, by which it is contended that it was left optional with the city and its inhabitants to take water from complainant. Great emphasis was placed upon the word "desire" which appears in this section of the ordinance. It was said that all of the provisions of the ordinance can be construed to harmonize with this view.

We do not now contend, and never have contended, that the ordinance imposes any obligation whatever upon the inhabitants of the City of Helena to purchase water from complainant. It was not within the power of the city to make such a contract so far as the inhabitants were concerned. The right of personal liberty enjoyed by the people does not admit of such a contract. The only right which the city could confer was the right to sell to the inhabitants desiring to purchase.

We do not base our claim of an implied contract upon the proposition that the city agreed that the inhabitants should purchase water. What we maintain is—that the City of Helena has contracted that it will not sell water to the inhabitants,—not that the inhabitants shall buy from appellant. It is entirely optional with every inhabitant to purchase water from appellant, or procure water from any other source. A person engaged in a private business or enterprise may sell the good-will of his business, and contract that he will not engage in a like business within a certain locality, but he cannot contract that his customers shall purchase from his successor. A person may have the right to sell a patented article within a certain territory, and he may sell that right and enter into a contract that he will not become a competitor within that territory. Such a contract would not impose upon the people any obligation to purchase such patented article.

We admit that the City of Helena has the authority to grant a franchise to another corporation to construct, maintain, and operate a water system in the City of Helena,

and that the inhabitants of said city would have an absolute right to purchase water from such corporation in preference to taking water from appellant. We again repeat that the proposition we contend for is that the City of Helena itself cannot rightfully sell water to the inhabitants,—that it has contracted away its privilege to do so.

It was neither claimed nor held in the Walla Walla Case that the city had by the contract entered into with the water company imposed any obligation upon the inhabitants to purchase water from the company. The controlling feature of the case was that the city had contracted that it would not supply water to the inhabitants. In other words, the city had agreed to waive the privilege of engaging in business as a competitor of the company. It was said in the opinion in the Walla Walla Case that the franchise granted was not exclusive, and that the city had the right to grant a similar franchise to another corporation.

THE RULE OF STRICT CONSTRUCTION INVOKED BY THE CIRCUIT COURT OF APPEALS IS NOT APPLICABLE IN THIS CASE.

The rule that grants by the legislature or by a municipality are to be strictly construed, and any doubt or ambiguity resolved in favor of the public which was invoked by the circuit court of appeals in this case, does not apply to a contract which is entered into with a municipality in the exercise of its business or proprietary powers. This rule only applies to the construction of grants by the sovereign power, and then only to such grants as are made without consideration.

In Washburn on Real Property, (6th Ed.), Vol. 3, p. 173, it is said:

"The strictness of construction in favor of the sovereign

and against the subject applies only in cases where there is a real uncertainty or ambiguity in the terms of the grant. Nor, as it seems, is the rule applicable where the grant is for a valuable consideration. In such case the rule of construction between the government and the subject is the same as between private grantors and grantees." See also Langdon v. Mayor, 93 N. Y. 147; Hyman v. Read, 13 Cal. 444.

By Ordinance No. 248 the city of Helena made a proposition to grant a franchise for certain considerations therein specified. This being true, the grant should be treated the same as a grant from a private citizen, and the presumptions are *"contra proferentem."*

But however this may be, the appellant does not contend that the implied contract relied upon is an incident to the grant. The implied contract on the part of the city results from the express contract on the part of the grantee of the franchise, its successors and assigns, to supply water to the inhabitants. In the case at bar the contract referred to should be treated and regarded independent of the grant of the franchise, and the same as though the franchise had been granted by the legislature direct. When so treated, the contract is subject to the same rules and principles of construction that are applicable to contracts between individuals.

IT DOES NOT FOLLOW FROM THE FACT THAT THE FRANCHISE IS NOT EXCLUSIVE THAT THE CITY CAN COMPETE WITH APPELLANT.

In the opinion of the circuit court of appeals in this case it is said: "It would seem that if the city has authority to grant a franchise to another corporation to construct and maintain another plant and system for supplying and selling water to its inhabitants, it would have the author-

ity to construct and maintain a system for that purpose itself." (Record, p. 153.) This assumption is entirely unwarranted. Walla Walla Case, 172 U. S. 1. In that case this court held that the city of Walla Walla was authorized to grant to another corporation or company a franchise such as had been granted to the Walla Walla Water Company, but notwithstanding this fact could not engage in business as a competitor with the water company because of the contract it had made.

HAS THE CITY EXPRESSLY RESERVED THE RIGHT TO BECOME A COMPETITOR OF APPELLANT?

The circuit court of appeals in its opinion also held that by virtue of section 3 of said ordinance 248 the city had expressly reserved the right to construct and operate a water plant and engage in the business of supplying water to the inhabitants.

Sec. 3 of the ordinance reads as follows:

"All pipes and mains including service pipes connected therewith, shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location of streets; and all repairs and extensions of such pipes and mains shall be done under the supervision of said street commissioner as to grade and location in streets. Nothing contained herein shall preclude said City of Helena from regrading or changing the grade of any street or streets within said City or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting, giving or granting any franchise, rights or easements to any person or persons, corporation or corporations, whomsoever, *so long as such franchises, rights and easements do not interfere with the franchises, rights and easements hereby granted.* And that said Helena Consolidated Water Company must and shall look solely and exclusively to the person or persons, corporation

or corporations, to whom such franchises, rights, and easements have been given by said city for any and all damages the said Helena Consolidated Water Company may sustain by reason of any interference with any of its pipes, mains or hydrants, or any exposure of the same caused by such person or persons, corporation or corporations." (Record, pp. 10, 11.)

The reservation contained in this section is nothing more than a declaration that the franchise granted is not exclusive, which is conceded by appellant. This section does not assume or purport to deal with the right or obligation to furnish water to the inhabitants. If other provisions of the ordinance confer the right and impose the contractual obligation to furnish water to the inhabitants, as contended by appellant, the reservation made cannot by any principle of construction affect the same. It is a cardinal rule in the construction of contracts and statutes that all provisions must be construed together.

The purpose of sec. 3 is to obviate any claim that the city, by granting the franchise, waived or released its right of control over the streets, avenues, or public grounds of the city. The right of the city to engage in the business of furnishing water to the inhabitants is not to any extent dependent upon its right to occupy the streets with pipes and mains. The question presented in this case must be decided without regard to the power of the city to grade the streets or occupy the same with works of a public nature.

The evident meaning of "other works or plants of a public nature" in said section 3 is any works or plants of a public nature except water works for commercial purposes. The mention of sewers, which are necessarily connected with a water supply, excludes the idea that water works were intended to be embraced within the expression "other works of a public nature."

* * * * *

Counsel for the city argued in the lower court that to construe the contract as prohibiting the city from engaging in the business of furnishing water to its inhabitants would make the same against public policy. This argument is fully answered by the opinion in the Walla Walla Case, 172 U. S. 1, in which this court said: "As the contract in question was expressly limited to twenty-five years, and as no attempt was made to grant an exclusive privilege to the water company, the city seems to have acted within the strictest limitation of the charter." The court further said: "Nor do we think the contract objectionable in the stipulation that the city would not erect water works of its own during the life of the contract.

* * * * *

The circuit court of appeals in its opinion in this case says with reference to sec. 6 of the ordinance, which provides for a supply of water for both the city and its inhabitants for a period of five years: "It might also be construed as an implied agreement that the city would not establish a plant of its own for the purpose of supplying water to its inhabitants or for its own purposes during that period." (Record, p. 156). It follows from this that if the agreement referred to in sec. 26 is not limited to the period of five years, there is an implied contract that the city will not at this time establish a plant of its own for the purpose of supplying water to its inhabitants, according to the view taken of the matter by the circuit court of appeals.

* * * * *

We therefore respectfully submit that the decree of the circuit court in this case was proper, unless the plea of estoppel by judgment should have been sustained.

Is there an Estoppel by Judgment as Claimed in Behalf of the Appellee?

The judgment relied upon was rendered and entered in an action commenced in the state court by the Helena Consolidated Water Company against the city of Helena. The complaint in the action is found in the record on page 53. The opinion of the supreme court in the case appears in the record on pages 117 to 125 inclusive.

It appears from the bill of complaint as amended and from the agreed statement of facts that the appellant acquired title to all of the rights, privileges and franchises granted and conferred by Ordinance No. 248, and the contract therein contained, and all other property of the Helena Consolidated Water Company through the foreclosure of mortgages, executed, acknowledged and delivered many years prior to the commencement of the action by the Helena Consolidated Water Company against the city of Helena in which the judgment relied upon as a defense was rendered. (See amendment to bill of complaint, Record, pp. 41 and 42; original bill of complaint, pars. 10 and 11, Record, pp. 3-4; and agreed statement of facts, Record, p. 44). It is not pretended or claimed that the trustees named in said mortgages, or the bondholders, were parties to the action in which said judgment was rendered. Under these circumstances the judgment pleaded cannot operate as an estoppel against appellant or have any effect whatever upon the right of appellant to maintain and prosecute this suit. This proposition is settled beyond controversy by the following cases:

Keokuk & Western R. Co. v. State of Missouri, 152 U. S. 301.

Keokuk & Western R. Co. v. County of Scotland, 152 U. S. 318.

Louisville Trust Co. v. Cincinnati, 76 Fed. 296.

Andrews v. National Foundry, etc. Works, 77 Fed. 774.

Hassal v. Wilcox, 130 U. S. 493.
Campbell v. Hall, 16 N. Y. 575.
Trust Co. v. Folsom, 75 Fed. 929.

In the case of Keokuk & Western R. Co. v. Missouri, *supra*, Mr. Justice Brown in delivering the opinion of the court said:

"While a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given, he is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage, unless he or someone authorized to represent him, like the trustee of a mortgage bondholder, is made a party to the litigation, although it would be otherwise if the mortgage were executed pending the suit or after the decree."

It also appears that the ordinances and action of the city council which it is claimed impair the obligation of the contract between the city and appellant are not the same as the proceedings of the city council and the acts of the officials involved in the case so commenced by the Helena Consolidated Water Company. The ordinances and resolutions, pursuant to which the city now proposes to acquire a water system and supply and engage in the business of furnishing its inhabitants with water, were not passed and adopted until several years after the judgment relied upon was rendered. It was an entirely different, separate and independent violation of the contract which was complained of in that case. In other words, the cause of action in the present suit is not the same cause of action which was decided in the former case between the Helena Consolidated Water Company and the city. The question of whether or not the city, by acquiring a water plant and supply and engaging in the business of furnishing water to its inhabitants, would violate the obligation of the contract with complainant, was not presented or considered in the action in which the judgment relied upon as a defense in this case

was rendered. It follows that the judgment would not operate as an estoppel even though the appellant herein was bound thereby.

Cromwell v. Sac County, 94 U. S. 351.
Philadelphia v. Ry. Co., 24 Am. St. Rep. 512.
Nesbitt v. Independent District, 144 U. S. 618.

SHOULD THE DECREE BE LIMITED TO RESTRAINING THE CITY FROM FURNISHING WATER TO THE INHABITANTS, THEREBY PERMITTING THE CITY TO ACQUIRE A PLANT AND SUPPLY FOR SUCH PURPOSE?

In the bill of complaint it is alleged: "That the indebtedness of the defendant, the city of Helena, is now and has been for several years last past in excess of three per cent of the assessed value of all the taxable property in said city, as determined by the assessment for state and county taxes during each and all of said years." (Par. 22, Record, p. 6). This allegation is admitted. (See par. 3 of agreed statement of facts, Record, p. 45).

In view of the fact that the city of Helena is indebted in excess of the limit prescribed by Sec. 6, Art. XIII of the constitution, it cannot procure a water supply except by virtue of the proviso in said action. The grant of power to procure such water supply is upon the condition that the revenues to be derived from the supply shall be applied to the payment of the indebtedness incurred therefor. It follows that if the city has by contract precluded itself from selling water, it has also disabled itself from procuring a supply by virtue of the authority granted in the provision of the constitution above referred to.

We therefore respectfully maintain that the city is not authorized to incur an indebtedness for a system or supply for the purpose of furnishing water to the inhabitants until

it is in a position where it can derive a revenue from such system and supply. If it can, eight years prior to the expiration of the contract with appellant, procure a system and supply to be used after the expiration of that contract, it could have procured a system and supply, at the time of the making of the contract, for use in the year 1910.

We submit that in view of the condition of the indebtedness of said city and the constitutional provision above referred to, the city is absolutely without authority at this time to acquire a supply to be used for municipal purposes. As appellant did not appeal from the decree entered, this question, however, is not before the court.

It will be noticed that in the Walla Walla Case the decree was of the same character and as broad in its terms as the decree in the case before the court. (172 U. S. 1).

THE CITY, HAVING PROVIDED A SUPPLY OF WATER FOR ITSELF AND ITS INHABITANTS BY CONTRACT, IS WITHOUT AUTHORITY TO BECOME A COMPETITOR OF APPELLANT.

The city of Helena was created by a special act of the Territorial Legislature in 1881. The charter of the city conferred the following powers, among others, upon the city council: (a) "To make regulations to secure the general health of the inhabitants;" (b) "To provide the city with water, erect hydrants and pumps, build cisterns and dig wells in the streets for the supply of engines and buckets;" (c) "To provide for the prevention and extinguishment of fires." (See charter of city approved Feb. 22, 1881; Laws of 12th Territorial Legislature, p. 112.)

The city became subject to the general municipal corporation act of the state in 1895. This act, as amended by an act approved March 8, 1897, conferred power upon the city council "To adopt, enter into, and carry out means for

securing a supply of water for the use of a city or town, or its inhabitants." (See Session Laws of 1897, p. 212.)

It is alleged in the bill of complaint that the appellant and its predecessors and grantors have fully complied with ordinance No. 248. In the agreed statement of facts it is stipulated that these allegations of the bill are true, (Record p. 44) and that said ordinance is in full force and effect. (Record, p. 49.)

It thus appears that the city has provided a "full, ample, and sufficient" supply of water for itself and its inhabitants. This being true, the only purpose that the city can have in acquiring a supply and installing a system and supplying water to the citizens at this time is to make a profit therefrom.

The powers granted to the city by its original charter and by the general law are not sufficient to authorize the city of Helena to engage in the business of supplying its inhabitants with water solely for the purpose of revenue.

Mauldin vs. City Council of Greenville, 11 S. E. 434.
Ottawa v. Carey, 108 U. S. 110.
Dillon on Municipal Corporations (4th Ed.) pp. 235-6-7.

DOES SEC. 6 OF ART. XIII OF THE CONSTITUTION AUTHORIZE THE EXTENSION OF THE LIMIT OF INDEBTEDNESS PROVIDED THEREIN BY A GENERAL LAW?

The purpose of said Section 6 is to prevent the improvident and extravagant expenditure of public funds. It is clearly the intent of this section that when a municipality has reached the limit of indebtedness provided therein, the question of incurring an additional indebtedness for a water supply is to be determined and decided by the Legislative Assembly. The Legislative Assembly is to determine

this matter from a consideration of the facts of each particular case. The passage of a special act is clearly contemplated. A general law on the subject is unauthorized. The Legislative Assembly may extend the limit as to a particular municipality, and the question of whether or not the indebtedness shall be incurred is to be determined by a vote of the taxpayers in that municipality.

By changing the phraseology of the section without affecting the meaning it would read: "The Legislative Assembly may extend the limit mentioned in this section when such increase is necessary to construct a sewerage system or procure a supply of water for such municipality." As one city may need a sewerage system or water supply, while another municipality may already be provided therewith, the necessity for an increase of the indebtedness is necessarily determined with reference to the facts in each particular case.

If the Legislative Assembly can pass a general law, taxpayers in cities throughout the state are without the protection this section was intended to provide. Instead of the necessity being a matter for determination by the Legislative Assembly it would be a matter for the decision of each municipality. The intent to place the question beyond local influence and overcome the general disposition on the part of the municipal authorities to be extravagant and improvident would be entirely frustrated.

If a general law had been contemplated, the provision that the legislative assembly may extend the limit would not have been incorporated in the section. All that would have been required is a proviso that the three per cent. limit shall not apply to an indebtedness incurred for a sewerage system or a water plant and supply to be owned and controlled by the city, and the revenues from which are to be devoted to the payment of the indebtedness incurred therefor. A general law nullifies the constitutional

authority conferred upon the legislature to determine the necessity for extending the limit. Furthermore, as a municipality can only act by virtue of granted powers, it did not require constitutional authority for the legislature to pass a general law. The constitution of a state is a limitation upon legislative power and not a grant thereof.

Sec. 26 of Art. V of the constitution of Montana, cited by the circuit court of appeals in its opinion, provides against special legislation where a general law can be made applicable. If our construction of Sec. 6 of Art. XIII is correct, a general law cannot be made applicable, and special legislation contemplated thereby is not prohibited by Sec. 26 of Art. V.

We therefore submit that a special act is required, and that Subd. 64 of Sec. 4800 of the Political Code of Montana, as amended, by virtue of which the city of Helena claims authority to incur the indebtedness in question, is unconstitutional.

THE CITY IS PRECLUDED BY THE PROVISIONS OF SUBD. 64 OF SEC. 4800 OF THE POLITICAL CODE, AS AMENDED IN 1897, FROM ACQUIRING A PLANT AND SUPPLY OTHER THAN APPELLANT'S.

We maintain that under a proper construction of Subd. 64 of Sec. 4800 of the Political Code, the city is precluded from acquiring a supply and system, except the supply and system of complainant. It is true that in the case of Helena Consolidated Water Company v. Steele, 20 Mont. 1, it was held that a somewhat similar statute was unconstitutional. There has, however, been no decision of the supreme court of the State of Montana relative to the validity or construction of the provision of subdivision 64

relied upon. This statute was adopted long after the case referred to was commenced.

The decision of the Supreme court in 20 Mont. 1, is clearly erroneous. The court assumed that it was compulsory upon the city to acquire the existing plant whether it desired to own a water plant or not. This assumption was made the basis of the decision. As a matter of fact the statute, like the provision of Subd. 64 referred to merely provided that *if the city elected to acquire a plant it should take the existing plant.* It was optional with the city whether it should acquire a plant. The effect of the statute is the same as the effect of the contract considered in the Walla Walla Case.

In the opinion in the case of Citizens Gas Light Co. v. Wakefield, 161 Mass. 432, the court said: "The Legislature might have authorized cities and towns to erect and maintain such plants without requiring the cities or towns to purchase any existing plant of this kind belonging to private persons or a corporation, but it has not done so. Under this statute a city or town is not required to establish any such plant, and private persons or corporations are not required to sell to any city or town any existing plant. In this respect, there is nothing compulsory in the statute. But if a town chooses to act under the statute, it must act in accordance with its provisions and take the burdens with the benefits."

We submit that this court, in determining the validity of the statute in question, is not bound to follow the decision of the supreme court of Montana involving an entirely different statute, although somewhat similar in its provisions. We further submit that the decision of the supreme court of the State is unsound, and should not even be regarded as an authority.

HAS THE APPELLANT, BY THE AGREED STATEMENT OF FACTS, WAIVED ITS RIGHT TO PRESENT THE QUESTION OF CONSTRUCTION OF SEC. 6 OF ART. XIII OF THE CONSTITUTION; AND THE QUESTION OF THE CONSTITUTIONALITY OF THAT PART OF SUBD. 64 OF SEC. 4800 OF THE POLITICAL CODE, AS AMENDED, REQUIRING THE PURCHASE OF THE EXISTING PLANT AND SUPPLY?

In the agreed statement of facts it is stipulated: "That the revenue for said purpose (the purpose of acquiring a plant and supply) will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended in accordance with the requirements of the Constitution and the provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it has no legal or equitable right to do so on account of the facts and admissions hereinbefore stated and made." (Record, p. 49).

This statement certainly cannot be tortured into an agreement that the general law enacted—Subd. 64 of Sec. 4800 of the Political Code, as amended—is authorized by the provisions of Sec. 6 of Art. XIII of the Constitution. Neither can it be construed as an admission by appellant that that part of said Subd. 64 requiring the purchase of its plant and supply is unconstitutional. It is apparent that the city regards the general law in force as conferring authority to incur the necessary indebtedness for a plant and supply, and intends to follow the same, which is in violation of the Constitution. It is also apparent that the city does not consider that there is any obligation resting upon it to acquire the plant and supply of appellant.

The stipulation referred to is simply an agreement that the city proposes to observe the requirements of the pro-

visions of Subd. 64 relating to the creation of an indebtedness for water works.

DOES THE INJUNCTION GRANTED BY THE CIRCUIT COURT VIOLATE SEC. 720 OF THE REVISED STATUTES OF THE UNITED STATES?

In Par. 20 of the bill it is alleged: "And your orator further shows that the said defendant, the city of Helena, pursuant to said ordinance No. 483, has commenced an action in the district court of the first judicial district of the State of Montana, in and for the County of Lewis and Clarke, against certain of the owners and claimants of the right to the use of the waters of McClellan Creek, a stream of water situate in Jefferson county, Montana, for the purpose of acquiring by the exercise of the right of eminent domain the right to the use of 350 inches of the waters of said McClellan Creek to supply the said City of Helena and its inhabitants with water, which said action is now pending and undetermined." (Record, p. 9).

By reason of the agreed statement of facts, the effect of the injunction granted upon certain other actions referred to in the plea to the jurisdiction (Record, pp. 26 to 28 inc.) is not before this court.

It is contended by counsel for the city that the effect of the injunction granted by the circuit court is to stay the proceedings in the action instituted by the city to acquire by the exercise of the right of eminent domain the right to the use of the waters of McClellan Creek.

It should be noted that the appellant in this case is not a party to the action pending in the state court. It should also be noted that by the prayer of the bill of complaint a writ of injunction is not sought which would in terms stay said action.

It cannot be denied that the circuit court would have jurisdiction, if this suit had been instituted before the commencement of the action referred to. It would have jurisdiction, because the amount in controversy exceeds the sum of two thousand dollars exclusive of interest and costs, and there is not only a Federal question presented, but there is also a diversity of citizenship.

The right to the relief demanded does not to any extent depend upon the commencement of said action. The purpose of alleging in the bill the institution of condemnation proceedings in the district court of Lewis and Clarke county was to show the intent of the city to acquire a supply and system. The allegations with reference to such action stand in the same relation to the relief demanded as the allegations regarding the acquiring by the city of the right to the use of the waters of Beaver Creek. These allegations can answer no other purpose. They can all be stricken from the bill without in the least affecting its sufficiency. The intent of the city is clearly manifest from the passage and approval of the ordinances and resolution complained of, and it was not necessary to go further and allege that action had been taken as therein authorized.

We have then a suit based upon a cause of action which existed prior to the commencement of the condemnation proceedings in the state court, and which was clearly within the jurisdiction of the circuit court of the United States. In other words, if this suit had been commenced before the institution of the action mentioned in the state court, there could be no question as to the jurisdiction of the circuit court to issue the injunction applied for.

Does the fact that the city of Helena, perhaps expecting the institution of this suit and with a view to defeating the jurisdiction of the circuit court, has commenced said action in the state court, prohibit the circuit court from taking jurisdiction of this suit which presents a cause of

action in no wise arising from the institution of such action, and which existed prior to the time the complaint in that action was filed? Was the appellant precluded from invoking the jurisdiction of the circuit court, in a case clearly within its jurisdiction by virtue of the constitution and laws of the United States, because, perchance, the city which has violated the appellant's rights has commenced an action in the state court which has for its object the realization of the benefits of its wrongful conduct?

The constitution of the United States secures to the complainant the absolute right to invoke the jurisdiction of the circuit court in the present case.

Home Ins. Co. v. Morse, 20 Wall. 445.
Reagan v. Trust Co., 154 U. S. 388.
Barron v. Burnside, 121 U. S. 186.

If said Section 720 of the Revised Statutes of the United States is to be construed to deprive the complainant of the right conferred by the constitution of the United States to maintain this suit in the circuit court, then said section is unconstitutional. The section, however, is not so construed by the federal courts.

R. Co. v. R. Co., 82 Fed. 943.
Marshall v. Holmes, 141 U. S. 589.
N. P. Ry. Co. v. Kurtzman, 82 F. 241.
Arrowsmith v. Gleason, 129 U. S. 86.
Gregory v. Pike, 67 Fed. 833.
Perry v. Sharpe, 8 Fed. 15.

In the case of Gregory v. Pike, 67 Fed. 833, before the circuit court of appeals for the first circuit, the court said:

"With reference to the other question, the appellant relies on Section 720 of the Revised Statutes. But it is now so thoroughly settled that this provision of law does not apply to proceedings incidental to jurisdiction properly acquired by a federal court for other purposes than that of enjoining proceedings in a state court, that the proposition needs no discussion by us."

In the case of Perry v. Sharpe, 8 Fed. 15, Mr. Justice Matthews said:

"This construction of these several provisions of the law is necessary, that they may each have some effect, and restrains the interpretation of Section 720 to cases where the jurisdiction of the courts of the United States is originally invoked for the very purpose of staying proceedings in state courts."

The case of Bank of Kentucky v. Stone, 88 Fed. 383, would seem to be directly in point. A bill in equity was filed by the Bank of Kentucky to restrain the assessment and collection of certain taxes for the benefit of the defendants, the city of Louisville, the county of Franklin and the city of Frankfort. Samuel H. Stone, one of the defendants, was auditor of public accounts for the state of Kentucky; Charles Finley, another defendant, was secretary of state; and George W. Long, also a defendant, was state treasurer. These three officers constituted the state board of valuation and assessment. The bill averred that the complainant had an irrevocable contract with the state of Kentucky by which taxes were limited to a certain amount per share, upon its stock, etc., and that the revenue act of the legislature of Kentucky, passed November 11th, 1892, impaired that contract, and was in violation of the constitution of the United States. In the answer filed it was averred:

"That to grant the injunction prayed for would be, in effect and in fact, to enjoin all proceedings in the state courts for collection of the taxes in controversy, contrary to Section 720 of the Revised Statutes of the United States. The laws of Kentucky authorize the collection of taxes by suit in the circuit and county courts of the state. There is now pending in the Franklin circuit court, at Frankfort, Ky., a suit by these defendants against complainant and others for mandamus to compel the state board of assessment to value and apportion complainant's franchise, and the auditor to certify the valuation and apportionment

thereof to the county clerk of Franklin county, in order to secure collection of the taxes now in controversy herein between these defendants and the complainant."

The case was heard before Harlan, Circuit Justice, and Taft and Lurton, Circuit Judges, upon a demurrer to the bill and a motion for a preliminary injunction. In the opinion it is said:

"One other point remains for consideration. The answer pleads that a mandamus proceeding has been instituted in a state court by the city of Frankfort to compel the board of valuation and assessment to certify the apportioned valuation of the franchises of the complainant; that this mandamus proceeding was begun before the action under consideration, and is pending; and that the preliminary injunction issued by this court will be in effect an injunction against that proceeding in the state court. We do not think so. It is settled that the pendency of a suit in the state court is no bar to a suit upon the same subject-matter in this court. * * * The injunction which we shall grant may be offered as a defense by the board of valuation and assessment in the court where the mandamus proceeding is pending, just as a judgment rendered in one of two pending suits for the same cause of action may be offered by supplemental pleading in the other. The sufficiency of the defense will be for that court. *We do not enjoin any suit at all by our order; all we do enjoin is the certification of the taxes.* That does not require the defendants to disobey an order of any other court, *or restrain their prosecution of a suit therein.* The demurrer to the bill must therefore be overruled, and the preliminary injunction prayed must issue." (We have italicized).

This case was affirmed by the Supreme Court of the United States, 174 U. S., Book 43; 1187.

In that case there was a cause of action which did not arise from, and was independent of, the mandamus proceedings pending in the state court, and over which the federal court had jurisdiction; in this case there is a cause of action which does not arise from, and is independent

of, the condemnation proceedings pending in the state court, and which existed prior to the commencement of such proceedings. In that case the certification of the taxes was necessary to the relief demanded in the mandamus proceedings; in this case the payment of the award of the commissioners or of the judgment which will be obtained in condemnation proceedings is necessary to acquire the property sought to be condemned. In that case an injunction was issued restraining and enjoining the defendants in the mandamus proceeding from certifying the tax; in this case the injunction applied for, if issued, will restrain and enjoin the defendant, the city of Helena, from paying the money necessary to acquire the property sought to be condemned. In brief, the two cases cannot be distinguished.

The real purpose and object of the bill of complaint in this case is to have the ordinances and resolution, which it is claimed operate to impair the obligations of the contract between the complainant and the city, declared null and void. It is necessary for the court to adjudge said ordinances and resolution void before granting any relief. As incidental to the principal relief to which the appellant is entitled, it is proper for the court to issue an injunction, for the same reason that the court is authorized to restrain the enforcement of a judgment of a state court which is sought to be cancelled, set aside, and vacated in a federal court. The issuance of such an injunction is authorized by Section 716 of the Revised Statutes of the United States.

The appellant in this case was entitled to a decree annulling and declaring void the ordinances and resolution complained of under the general prayer for relief contained in the bill.

Tyler v. Savage, 143 U. S. 79.
Jones v. Van Doren, 130 U. S. 684.

The plea in this case is insufficient. It does not appear

that the state courts have acquired jurisdiction in any of the cases mentioned.

Rodgers v. Pitt, 96 Fed. 668. (Opinion by Hawley, J.).

The pendency of the actions commenced by Palmer and by appellant in the state courts cannot in any manner affect the jurisdiction of this court.

City of North Muskegon v. Clark, 62 Fed. 694.
Defiance Water Co. v. Defiance, 100 Fed. 178.
Watson v. Jones, 13 Wall. 679.

The plea, so far as it relates to the cases commenced by Palmer and by appellant in the state courts, is insufficient.

Green v. Underwood, 86 Fed. 427.
Griswold v. Bacheller, 77 Fed. 857.

An examination of the authorities will disclose that the provisions of Section 720 of the Revised Statutes of the United States, do not prohibit a circuit court of the United States from assuming jurisdiction of a case over which it is given jurisdiction by the constitution and laws of the United States, even though it is necessary to the complete exercise of such jurisdiction to issue a writ of injunction, which incidentally has the effect to deprive a party of the benefits of an action or proceeding pending in the state court at the time of the commencement of the suit in the federal court. As said by Grosscup, J. in the case of Railroad Co. v. Railroad Co., 82 Fed. 943:

"In their literal scope, the constitution and statutes conferring jurisdiction, and this Section 720, are in conflict, and to the extent of such conflict, the legal effect of the latter statute must be narrowed down. The cases cited, and a line of cases in the supreme court of the United States, of which they are a development, clearly show that this is the interpretation put upon these two apparently inconsistent lines of legislation."

As also stated by Mr. Justice Matthews in the case of Perry v. Sharpe, 8 Fed. 15:

"This construction of these several provisions of the law is necessary that they may each have some effect, and restrains the interpretation of Section 720 to cases where the jurisdiction of courts of the United States is originally invoked for the very purpose of staying proceedings in state courts."

If, however, this court should be of the opinion that said Section 720 is applicable, and operates to prevent the issuance of an injunction restraining and enjoining the appellee from acquiring the water supply sought to be acquired by such condemnation proceedings, such holding could not defeat the right of the appellant to an injunction preventing the city from acquiring a plant and system and from entering into competition with the appellant by furnishing the inhabitants of the city with water. The prayer of the bill is for a writ of injunction, not only restraining and enjoining the city from acquiring a water supply, but also from acquiring a water plant and system, from engaging in the business of furnishing said city and its inhabitants, or any thereof, with water, and from incurring any indebtedness or expending any money therefor.

The fact that the city may acquire a supply would not prevent the court, after such supply has been acquired, from issuing a writ of injunction enjoining the city from engaging in the business of furnishing its inhabitants with water.

THE OBJECTION THAT THE BILL IS MULTIFARIOUS.

The objection that the bill of complaint is multifarious is clearly waived by the following stipulation contained in the agreed statement of facts, to-wit:

"It is hereby stipulated and agreed between the parties to the above entitled suit, that the following statement of facts may be, and the same are hereby made the facts upon which the trial and determination of all of the questions and issues of law and facts shall be had and a final decree thereupon entered, and that the same may be adopted by said court as its findings herein for that and all purposes of said suit." (Record, p. 44).

It should be noted that the different grounds presented for the relief sought are all based upon the same transaction—the action taken by the defendant the city of Helena, and proposed to be taken, for the purpose of acquiring a water plant and supply, which it shall own and control. It should also be noted that but one relief is demanded.

It is said by the authorities that no general rule has been established which will apply to all cases. Each case must depend upon its own circumstances. Cutter v. Iowa Water Co., 96 Fed. 779.

It is also said that "the objection of multifariousness is one which addresses itself to the sound discretion of the court." Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. 651.

In the case of Barcus v. Gates, 89 Fed. 783, the court said:

"Multifariousness arises from the fact either that the transactions which form the subject-matter of the suit are so separate and dissimilar that they cannot conveniently be tried in one record, or that some defendant is able to say that as to a large part of the transaction set out in the bill he has no interest or connection whatever. A bill is not multifarious because there are several causes of action, if they grow out of the same transaction, and if all the defendants are interested in the same rights, and the relief against each is of the same general character, the bill may be sustained."

In a note found in Daniel's Chancery Pleading and Practice, (5th Ed.) *344, we find the following:

"Neither is a bill multifarious where its allegations all relate to one transaction between the same parties or one and the same subject matter and the same injury; although it may pray for two different methods of relief against that injury. Neither is a bill multifarious because several grounds are set out to show the plaintiff's right to the relief sought."

The following authorities seem to be conclusive that the bill in this case is not multifarious.

Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. 651.
Barcus v. Gates, 89 Fed. 783.
Daniell's Chan. Pl. & Pr., (5th Ed.) *344.
Cauley v. Lawson, 5 Jones Eq. 132.
Hart v. McKeene, Walker's Ch. 417.
Wales v. Newbould, 9 Mich. 45.
Torrent v. Hamilton, 95 Mich. 15.
Pope v. Salamantha Oil Co., 115 Mass. 286.
First Nat. Bank v. Peavey, 75 Fed. 154.
Rosenstein v. Burns, 41 Fed. 841.
Stafford Bank v. Sprague, 8 Fed. 377.
Blake v. Van Tilborg, 21 Wis. *672.
Pullman v. Stebbins, 51 Fed. 10.
U. S. v. American Bell Tel. Co., 128 U. S. 315.
Dyer v. Cramston Co., 24 Atl. 827.
Davis v. Berry, 106 Fed. 761.

In determining whether or not the objection of multifariousness is well taken, the court will look to the convenience of the parties and the expediency in requiring separate bills to be filed.

Carrol v. Roosevelt, 4 Edwards Ch. 211.
Wood v. Pulsifer, 54 Vt. 70.
DeWolf v. Sprague Mfg. Co., 49 Conn., 299.
Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. 651.

We submit that the bill of complaint is not multifarious.

Respectfully submitted,
B. PLATT CARPENTER,
STEPHEN CARPENTER,
M. S. GUNN,
Solicitors and of Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM 1904.

No. 27.

THE HELENA WATER WORKS COMPANY,
APPELLANT,

versus

THE CITY OF HELENA,
APPELLEE.

REPLY BRIEF OF APPELLANT.

It would seem from the briefs of appellee that the positions taken by the solicitors for appellant relative to the contract contained in Ordinance No. 248 are misunderstood. We have never contended in this case, and do not now contend, that by the passage and approval of Ordinance 248 and the acceptance thereof the city is precluded from furnishing itself with water. We concede that there is at this time no obligation on the part of appellee by virtue of this ordinance to purchase water from appellant. Even during the five-year period for which the Helena Consolidated Water Company contracted to supply the city with water and the city contracted to pay therefor, the city would not have violated any contract with the company if it had established a water-works system of its own and supplied itself with water, provided it continued to fulfil its promise to pay the company.

It is true that a contention is made on behalf of appellant

that the city of Helena should be restrained from acquiring a system and supply, other than that belonging to appellant, for the purpose of furnishing water to itself. This contention, however, is not based to any extent upon Ordinance No. 248, but is founded upon the proposition that under the constitution and laws of Montana the city is without power to acquire water works for the sole purpose of supplying itself with water, and also on the further proposition that, if it desires to own a supply and system, it is required to take the supply and system of appellant because of the provisions of subdivision 64 of section 4,800 of the Political Code of Montana as amended. (Appellant's original brief, pages 43 to 48, inclusive.)

The position taken by appellant is that by Ordinance 248 the city has precluded itself from engaging in the commercial business of furnishing water to its inhabitants. We maintain that by the contract contained in this ordinance the Helena Consolidated Water Company for itself, its successors and assigns, expressly agreed to furnish water to all of the inhabitants of the city during "the term of the agreement," which we assert to be twenty years, and that by reason of the contractual obligation thus assumed by the company there is the implied promise or undertaking on the part of the city that it will not during such period become a competitor of appellant. As what is implied in a contract is as much a part of the contract as what is expressed, the case is identical with the Walla Walla case. The fact that in the ordinance involved in the Walla Walla case there was a provision authorizing the city to purchase or condemn the water supply and system of the Walla Walla Water Company does not distinguish that case from the case at bar, as the right to purchase or condemn existed independently of the provisions of the ordinance regarding the matter.

Long Island Water Supply Co. v. *Brooklyn*, 166 U.S. 685.

The position of appellant with reference to the implied contract is attempted to be met by the following claims: first, that the term of the agreement mentioned in section 26 of the ordinance is five years; second, that by section 3 of the ordinance the city has reserved the right to acquire waterworks and engage in the business of supplying water to the inhabitants.

Little can be added to what has already been said in the brief of appellant heretofore filed with reference to this first claim. It appears from the recitals in the ordinance that the city advertised "for proposals for a water supply for said city and the inhabitants thereof"; that the Helena Consolidated Water Company made the best proposition in answer to the advertisement, and was awarded the contract. By section 8 of the ordinance the water company was required to provide twenty miles of mains within the limits of the city. Section 10 of the ordinance provides that "the said Helena Consolidated Water Company shall lay and maintain, in addition to the twenty miles of mains hereinbefore specified, such mains, of such sizes, at such times, and upon such streets, as the city council shall from time to time direct." In section 17 of the ordinance it is provided "that said company shall not refuse to permit connections to be made by, or to sell or deliver water to any persons who shall offer to pay for the same," etc. Section 10 of the ordinance clearly imposes a contractual obligation upon the grantee of the franchise, its successors and assigns, which would not exist independent of express contract. Sections 10 and 17 have to do with supplying water to the inhabitants, and by no process of reasoning can it be said that they are limited in their operation to a shorter period than the life of a franchise. These sections by themselves constitute a contract to supply all of the inhabitants with water during the existence of the franchise. The term of the agreement referred to in section 26 of the ordinance is the time during which extensions of

mains can be ordered and connections therewith made as provided in said sections 10 and 17.

If the argument advanced in behalf of appellee is sound, then either the contractual duty to make extensions of mains imposed by section 10 expired after the lapse of five years or the city could order extensions after five years but there was no obligation on the part of the water company to supply water through the same. In section 9 of the ordinance it is provided that "the water company shall maintain said hydrants during the continuance of this contract." If the contract was limited to the term of five years, then with the expiration of such term the hydrants could have been removed. It appears, however, from the record that after five years had elapsed the city applied for and procured to be issued a writ of mandamus, compelling the company to maintain the hydrants and furnish water for fire protection.

The argument advanced in behalf of the city, that the agreement referred to in section 26 is the agreement with the city for a supply for municipal purposes, completely overlooks the facts that the city advertised for proposals for a supply for both the city and the inhabitants; that a contract for this duplicate supply was awarded; and section 26 relates to the supply for the inhabitants.

With reference to the claim that the city has reserved the right to install water-works and compete with appellant. In order to sustain this claim, the argument is made that by section 3 of the ordinance the city has reserved the right to construct and maintain "works or plants of a public nature," which includes water-works. It will be noticed that the first five sections of the ordinance deal exclusively with the franchise granted. The remainder of the ordinance has to do with the contract to supply the city and its inhabitants with water. If the ordinance consisted merely of the first five sections referred to, there would be no doubt of the right of the city to install water-works, and engage in the business of supply-

ing its inhabitants with water. When, however, the other sections of the ordinance are considered,— which may be said to embrace the contract feature of the ordinance,— there can be no doubt that the city has waived or contracted away its right to supply water to the inhabitants.

It may be conceded for the sake of argument that the expression "works or plants of a public nature" includes water-works. As before stated, the city has the right, so far as Ordinance 248 is concerned, to acquire water-works to supply itself with water and supply its inhabitants after the expiration of twenty years, the term of the contract. If, however, the right to maintain water-works embraces the right to use the same for furnishing water to the inhabitants, as argued on behalf of appellee, then clearly the general expression "works or plants of a public nature" would be limited in its meaning so as to exclude water-works for supplying the inhabitants with water, thereby giving force and effect to the contract by the city that it will not engage in such business.

As shown in the original brief of appellant the city, in contracting for a supply of water for its inhabitants, exercised its private or business powers as distinguished from its public or governmental power; and, in construing Ordinance 248 to determine whether or not the city has waived its privilege of furnishing water to its inhabitants, the rule of strict construction invoked in behalf of appellee does not apply, but, on the contrary, the same rules and principles govern that are applicable to the contracts of private individuals. We again state that we do not claim any waiver on the part of the city of its privilege of furnishing water to the inhabitants by reason of the grant of the franchise. The claim we make is founded upon the contract with the city for a supply for the inhabitants, which it entered into in the exercise of its private or business powers.

It is claimed in the brief of appellant that this case is controlled by the decision in the Skaneateles case; and, in order

to make the two cases parallel and the said decision fit the case at bar, attention is called to the provision of Chapter 566 of the Laws of New York, 1890, referred to in the opinion of this Court in the case (184 U. S., p. 362). Chapter 566 did not take effect until May 1, 1891, and could not in any manner affect the relations between the village of Skaneateles and the Water Company which had theretofore become established and fixed. The provision of Chapter 566 of the Laws of 1890 is not referred to in the opinion of this Court as having any effect upon the rights of the parties to that case.

Considerable is said in the brief of appellee relative to what is termed the "Mandamus Case." That case had to do solely with the supply of water for the city, and did not, to any extent, involve the rights and obligations of the parties with reference to a supply for the inhabitants. Consequently, the questions presented in the case before the Court were not considered, and could not have been.

Respectfully submitted,

B. PLATT CARPENTER,
STEPHEN CARPENTER, AND
M. S. GUNN,
Solicitors and of Counsel for Appellant.

FILED
FEB 9 1904
JAMES H. McKENNEY, Clerk.

No. ~~189~~ 27

IN THE

Supreme Court

OF THE

United States.

OCTOBER TERM, 1903.

THE HELENA WATER WORKS COMPANY,
Appellant,

versus

THE CITY OF HELENA,
Appellee.

MOTION TO DISMISS APPEAL, OR TO AFFIRM, NOTICE THEREOF, AND BRIEF.

EDWARD HORSKY,
City Attorney,
EDWIN W. TOOLE,
THOMAS C. BACH,
Counsel for Appellee.

Naegele & Co., Printers, Helena, Montana.

IN THE

Supreme Court

OF THE

United States.

THE HELENA WATER WORKS COMPANY,

Appellant,

versus

THE CITY OF HELENA,

Appellee.

MOTION TO DISMISS OR TO AFFIRM.

Now comes the appellee in the above entitled suit, and moves the court to dismiss the appeal therein, for that it manifestly appears from the record, that it has no jurisdiction to hear and determine the same upon the merits thereof:

I.

The decision from which the appeal is taken is not based and does not rest upon the construction of any act of congress or interpretation of any provision of the Federal Constitution.

II.

ord that the franchise con-
pressed or implied, upon
llant, involving a Federal

It is apparent from the re
tract contains no obligation,
which the alleged error of ap
question, can rest.

III

ons invoked by appellant
the franchise contract so
this Court.

The constitutional provi
are in no wise involved unde
as to confer jurisdiction upo

IV

ith its motion to dismiss
noves the Court to affirm
from the record that the
ly, and that the question
epends is so frivolous as

Appellee, in connection
for want of jurisdiction, alsc
for that it manifestly appea
appeal was taken for delay
upon which the jurisdiction
not to need further argume

RD HORSKY,
City Attorney,

N W. TOOLE, and
AS C. BACH,
Attorneys for Appellee.

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IN THE

Supreme Court of the United States.

THE HELENA WATER WORKS COMPANY,

Appellant,

versus

THE CITY OF HELENA,

Appellee.

NOTICE OF SUBMISSION OF MOTION.

To Messrs. M. S. Gunn, and Carpenter and Carpenter, Counsel for Appellant:

Please take notice that on Monday, the 22nd day of February, 1904, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

EDWARD HORSKY,
City Attorney,
EDWIN W. TOOLE,
THOMAS C. BACH,
Counsel for Appellee.

Receipt of the foregoing notice of motion, and receipt of a copy thereof, together with receipt of copies of the brief of argument therein referred to, are hereby acknowledged and admitted this 30th day of January, A. D. 1904.

M. S. GUNN,
B. PLATT CARPENTER,
STEPHEN CARPENTER,
Counsel for Appellant.

IN THE

Supreme Court of the United States.

THE HELENA WATER WORKS COMPANY,
Appellant,

versus

THE CITY OF HELENA,
Appellee.

BRIEF.

In support of the foregoing motion appellee respectfully submits the following points and authorities:

I.

The pleadings and records show that on the 15th day of January, 1890, the City of Helena adopted ordinance No. 248 (Exhibit "A," Record 9), which was duly accepted by the appellant. In it was contained a franchise. Appellant claimed that said franchise contained certain "implied" obligations on the part of the city, and upon the existence of these alleged obligations and the alleged violation thereof, the right of this appeal depends. Under the organic law of the Territory of Montana its legislative assembly was at that time prohibited from passing any law "granting to any corporation, as-

sociation or individual any special or exclusive privilege, immunity or franchise whatever." The consttution and laws of the State are in line with this theory, and the laws of the territory followed the organic law.

"The legislative assembly shall not pass any local or special laws in any of the following enumerated cases, that is to say: * * * granting to any corporation, association or individual, * * * any special or exclusive privilege, immunity or franchise whatever."

Montana Const., Article V, Sec. 26.

Aside from all this, the very terms of the franchise contract emphatically declare that no such rights are conferred. While in consideration of the franchise contract it exacts certain duties of the appellant, it nevertheless expressly provides: "That nothing herein contained shall be construed so as to give to the Helena Consolidated Water Company, or its successors or assigns the exclusive right * * * of conveying, distributing or selling the same throughout the said city or of furnishing the same to the said city except as herein set forth."

Ord. 248, Fol. 18, 19, page 10.

"Nothing contained herein shall preclude said City of Helena from regrading or changing the grade of any street or streets within said city, or from the construction of maintenance of sewer work, or other works or plants

of a public nature, or from letting, giving or granting any franchises, rights or easements to any person or persons, corporation or corporations, whomsoever, so long as such franchises, rights and easements do not interfere with the franchises, rights and easements hereby granted."

Section 3, pages 10, 11.

"Provided, always, that said company shall not refuse to permit connections to be made by or to sell and deliver water to any persons who shall offer to pay for the same and shall comply with the provisions of this ordinance, and with such regulations as may be from time to time prescribed by the City Council of said City, and the reasonable rules and regulations of said Company."

Section 17, page 15.

"It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed."

Section 26, page 18.

It is manifest that there is no inhibition to prevent this provision of the franchise contract and that the parties are bound by it. There is therefore a franchise contract by which the appellant is allowed to furnish water to the inhabitants, if they desire to take it at the maximum rates fixed. This brings the question involved squarely within the decision of this Court in

> City of Joplin, appellant, v. Southwest Missouri Light Company, reported in Advance Sheet, Supreme Court of the United States Reports, December, 1903, No. 32, decided November 16, 1903.

In this case Mr. Justice McKenna, in speaking for the Court, in terse and potential language, says: "The limitation contended for is upon a governmental agency and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights, and against limitations upon the powers of government."

The substance of the decision is that, as in the case

at hand, there is neither an express or implied obligation not to put in competitive works.

II.

There is but one other question therefore left to consider: If the record shows that there is no violation of any obligation of the franchise contract upon which a constitutional question is involved, there being no act of congress applicable or to be interpreted, it logically follows that the Court will say that there is no jurisdiction except to dismiss the appeal.

This would seem to be the logical conclusion. It is a condition precedent to the exercise of jurisdiction and it would be a hard proposition to maintain that the jurisdiction could be sustained without it. It goes without saying that there is no express or implied obligation upon which to rest a constitutional question. Upon this preliminary proposition depends the jurisdiction of this Court to reach the Federal question and pass upon its merits. If there is no obligation in the franchise contract to be violated in respect to the matters contended for it cannot in reason be said that any constitutional question can possibly be involved. The whole matter is solved in the interpretation of the franchise contract and no pretension is made that any act of congress or its interpretation is involved and the jurisdictional question depends solely upon the proposition as to whether there exists any obligation to be violated.

When an appeal is taken and the error assigned is based upon the violation of one of the obligations of the contract, and it is manifest from the record that no such obligation exists, the Court has no power or jurisdiction except to dismiss the action and no inquiry into the merits can be had or required. Whether the alleged error referred to the remedy or the violation of the obligations of a contract would of course be without merit, as the condition precedent upon which it must rest does not exist. So it is apparent, there is no obligation, express or implied, upon which to predicate a constitutional question, upon which the error is assigned. Should this case go to final hearing it would seem that all this Court could do would be to dismiss the appeal, and that is just what is asked by the motion.

Conceding that notwithstanding the decisions heretofore made in this case this Court can and will consider the question of the obligations contained in the contract as germane to the jurisdictional question, it still remains a preliminary and conditional one upon which such jurisdiction depends. If it can properly be decided upon this motion, the necessity of such a speedy determination is ~~potentially~~ contingently suggested from the very nature of the controversy, and facts contained in the record. If it is apparent from the record that all that could be done upon a final hearing would be a dismissal of the appeal for want of jurisdiction, it would seem that this motion should be sustained. We have assumed, of course, if this motion

is proper, the Court upon final hearing could not affirm or reverse the judgment and enter any other order than that dismissing the appeal.

The appellee respectfully submits that the points made in this motion are fully and unequivocally sustained by the following authorities:

Moran v. Horsky, 178 U. S., 205.

St. Paul Gas Light Co. v. St. Paul, 181 U. S., 142, 147.

New Orleans Water Co. v. Louisiana Sugar Refining Co., 125 U. S., 18.

City of New Orleans v. New Orleans Water Works Co., 142 U. S., 79.

New Orleans Water Works Co. v. Louisiana, 185 U. S., 336, 345.

Mobile and Ohio Railroad Co. v. Tennessee, 153 U. S., 486.

Hamblin v. Western Land Co., 147 U. S., 532.

Wilson v. North Carolina, 169 U. S., 595.

Muse v. Arlington Hotel Co., 168 U. S., 430, 435.

Shreveport v. Cole, 129 U. S., 36.

McCain v. Des Moines, 174 U. S., 168.

If this Court is of the opinion that there is no express or implied obligation in the franchise contract,

upon which a constitutional question could rest, and that the decision of the trial and appellate court rested upon those grounds and none other, then it logically follows that it is based properly upon grounds independent of the constitutional question sought to be raised. It may be regarded as incidental in a sense to the constitutional question, yet it is preliminary to the jurisdiction and must be determined in advance whether on motion or at the final hearing. While we are not able to find authorities *directly* in point upon the question in hand, the reasoning and analogy in the cases cited seems to be so complete as to remove all doubt of their applicability and controlling effect. It would seem that the question of jurisdiction ought always to be considered and determined at any stage of the case, especially where it is presented and a ruling upon it requested.

—o—

But little further need be said in support of the fourth ground of this motion.

The assumption that competition when not *limited* or *restricted* is taking the property of a competitor without compensation or due process of law is too absurd and contradictory to require argument to refute it. The *power* of the city under the constitution and laws to make a franchise contract reserving the right to put in competitive works and plants, cannot be doubted, and that it has done so is beyond question. It logically and emphati-

cally follows that the appeal, which depends *entirely* upon the violation of the obligations of the contract, in putting in said works, is clearly frivolous, and cannot be maintained upon the same grounds, under the facts in this case, that it was contended for below.

The correct doctrine certainly is, as announced by this Court in the Joplin case, that the right to put in such works or plants of a public nature exists without such express reservation. What then can be said of the good faith of an appeal taken and sought to be maintained in the very face of the express provision of the franchise contract that provides it shall not be exclusive, and that the city reserves the right to put in any works or plants of a public nature. And the power to cede away *such a right* necessarily remains with it as a public right, and the *power* to reserve it is simply a retention of then existing right. The act of congress involving this appeal must, of course, depend upon, whether it involves *construction* or *application* of, the Constitution of the United States. No question of constitutionality of any Federal law, or the construction of any treaty entered into under its authority, is brought in question, nor is the Constitution or the laws of the State claimed to be violated.

Appellant assumes that there is an implied contract that its franchise shall be exclusive, but the express provision of the contract is that it shall not be. It assumes that there is an implied obligation that the city will not put in its own plant or works, but the express terms of

the contract provide that the city may do so. As certain as the city possesses the power to confer the right claimed, that certain it is it could retain it, and this it has done.

The whole question, therefore, in the fourth ground of the motion, is confined to the proposition whether an appeal sought to be maintained, fairly and squarely, in the face of the primary rights of the parties, does not come within the language and meaning of the rule upon which the motion in this respect applies. We respectfully submit that it does. It goes without saying, if the franchise contract has no express or implied obligation by which the appellee is not entitled to put in a competitive plant of its own, then there is no obligation to be violated and in the very nature of things could be no taking of property without just compensation or due process of law. If, therefore, the Court should be of opinion that this question is so intimately connected with or incidental to the constitutional question that it might properly be considered upon the final hearing, we respectfully submit that the grounds upon which the constitutional question rests are absolutely frivolous and brings the case clearly within the provisions of Subdivision 5 of Rule 6 of this Court.

The Joplin case, to which we have heretofore referred, conclusively settles the legal proposition involved; besides, in this appeal it appears in the record that the franchise privileges could not be made exclusive under the Constitution and laws of the State, and by the express

provisions of the contract itself no such rights are conferred or intended to be conferred. Aside from this it is expressly provided, as we have seen, that it shall not be exclusive or prevent appellee from constructing or maintaining sewers or other works or plants of a public nature.

We take it that this rule of Court was intended to meet a case like this, where a corporation had secured the suspension of the exercise of the powers and privileges of a city to install water works of its own. If the case presents one that is frivolous and cannot be maintained, this motion will be granted and the rights secured to the city afforded to it; otherwise great and serious injustice might result.

Respectfully submitted,

EDWARD HORSKY,
City Attorney,
EDWIN W. TOOLE,
THOMAS C. BACH,
Counsel for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

THE HELENA WATER WORKS CO.,

Appellant,

vs.

THE CITY OF HELENA,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Before proceeding to reply to the brief of appellant we desire to call the attention of the Court to some matters which were presented in the Circuit Court of Appeals by appellant.

This is a suit in equity brought by the appellant in its dual capacity as a corporation organized and existing under the laws of the State of New Jersey, and as a taxpayer of the State of Montana. The object of the suit is to enjoin the appellee, a municipal corporation existing under

the constitution and laws of the State of Montana, from constructing and maintaining a water plant of its own, for the purpose of supplying the city and its inhabitants with water. The complaint sets up the necessary facts, to sho wthat appellant was a taxpayer of the City of Helena and State of Montana, and entitled to seek such relief as is incident thereto. It also sets up Ordinance No. 248 of said city and makes it a part of its complaint, and alleges a compliance with its terms and conditions. Upon its right as a taxpayer, and its rights under said ordinance, it bases its suit, all of which will appear more fully by its said complaint and amendments thereto, on pages 1 and 23 of the record.

On the 13th day of May, 1901, appellee filed its demurrer to said complaint upon the grounds that it did not state facts entitling appellant to the relief sought, or any relief, and that it was altogether multifarious. This demurrer was, after argument, overruled, and exception duly taken to such ruling. See record, p. 25.

Thereupon appellee filed its answer to said bill of complaint and amendments thereto, and to which answer appellant filed its replication. See record, p. 29.

Upon the issues thus presented the parties to this appeal filed an agreed statement of facts upon which the trial was had. See record, p. 44.

And upon the foregoing record, the Court on the 21st day of August, A. D. 1902, rendered and entered its decree in favor of appellant and against appellee, by which it

was ordered and decreed that the injunction theretofore issued be made permanent, and appellee enjoined from acquiring, constructing and maintaining a water plant and supply for the purpose of furnishing the inhabitants of said city with water until the expiration of the franchise granted by Ordinance No. 248, and from said decree and the whole thereof this appeal is taken. See record, p. 129.

Before the signing of said decree and during the argument of the merits of the suit, appellee objected to any decree in favor of appellant, and especially to that portion thereof preventing the construction and completion of a water plant, at any time prior to the expiration of said franchise it should deem expedient to do so, and that said decree be limited to selling or disposing of water to the inhabitants of said city.—Which objections and request were overruled, said decree passed as presented and appellee's bill of exceptions signed, sealed and made a part of the record. See record, p. 130.

As the merits of this appeal depend almost, if not entirely upon the agreed statement of facts, for convenience we reproduce it here:

AGREEMENT UPON FACTS.

It is hereby stipulated and agreed between the parties to the above entitled suit, that the following statement of facts may be, and the same are hereby made the facts upon which the trial and determination of all of the questions and issues of law and facts shall be had and a final decree

thereupon entered, and that the same may be adopted by said Court as its findings herein for that and all purposes of said suit.

It is further stipulated and agreed that the facts herein agreed upon are limited and confined to this suit alone, and shall not be deemed as admissions upon the part of either party for any other purpose than hereinabove set forth; and that no legal deductions set forth in said bill of complaint shall be deemed admitted.

It is agreed that each and all the allegations contained in complainant's bill of complaint as amended, up to and including paragraph 20, are true and correct, except in so far as any legal deductions are stated and made therefrom; and the further fact that in the purchase of Beaver Creek Water the warrants issued in payment therefor have been paid, and said warrants were issued in exchange by said city for, and the deeds of conveyance for said waters were delivered to said city upon receipt of, said warrants; and that immediately after receiving said warrants, and delivering said deeds as aforesaid, said warrants were presented to the city treasurer on said 3d day of April, 1901, and immediately thereupon said city treasurer paid such warrants out of the cash on hand in the city treasury of said city derived from taxes levied and collected for general municipal and administrative purposes, and that it is now the legal owner and holder of the water so purchased.

II.

It is agreed that in the month of January, 1895, the defendant commenced the action and proceedings mentioned in paragraph 21 of complainant's bill of complaint, and that in such action and proceedings it was finally adjudged and determined as shown and disclosed by the pleadings herein, the judgment thereupon entered, and the opinion of the Court, all of which is made a part of this agreed statement of facts, and are hereto attached; and that said judgment is in full force and unreversed.

III.

That the indebtedness of the defendant is now and has been for several years last past, in excess of three per cent (3 per cent) of the assessed value of all the taxable property in said city, as determined by the assessment for the state and county taxes, during each and all of said years. That said indebtedness is now, and has been for several years last past, in excess of the sum of four hundred and eighty-six thousand dollars ($486,000), and that the value of the taxable property during all of said times in said city, as determined by the assessment for the state and county taxes for each of said years, does not and has not exceeded the sum of thirteen million dollars ($13,000,000), and that no election has ever been held by the said defendant, the City of Helena, at which either the question of issuing bonds or contracting an indebtedness for a

water plant, water system and water supply, to be owned and controlled by said city, has been submitted to the qualified electors thereof, and that no other objection upon which proceedings to allow a water plant and supply are based, has been had, except as hereinafter stated.

IV.

That said defendant, the City of Helena, has never given the complainant notice that it desired to purchase its plant, franchise or water supply, and that no effort has ever been made by the said defendant to agree with complainant upon the terms of such a purchase to acquire the plant and water supply of complainant, except as hereinafter stated in paragraph VIII, and as follows:

That during the months of September and October, 1899, pursuant to an order of the city council of said defendant city, defendant advertised for sealed proposals in the "Helena Daily Independent," a daily newspaper of general circulation in said city and state; and in the "American Contractor," a weekly publication of general circulation in the City of Chicago, State of Illinois, and throughout the United States, for sealed proposals for the "construction and purchase of a water plant and supply," in accordance with certain plans and specifications theretofore adopted by said city council, said proposals to be opened on November 6th, 1899. That said plans and specifications expressly stated therein and contained the following: "It is expressly understood that nothing

herein contained shall prevent any company now operating a water plant in the city, or any other company or individual from submitting a bid for the sale of any plant now constructed, or one proposed to be constructed, upon a plan different from that herein specified, but any such company or individual may submit any bid that it or he may desire, upon any other basis, and any and all such bids will be considered by the council in connection with any and all other bids received." And that in response to said advertisement, a proposition was received from complainant herein, through Edgerly and Crocker, by Francis M. Edwards, their agent, offering to sell to defendant the water plant and system of complainant herein for the sum of nine hundred and ninety thousand dollars ($990,000). That at the time of receipt of said proposition by complainant, and the opening of bids by said city, to-wit: November 6th, 1899, the limit of indebtedness over and above the three per cent (3 per ct.) limit fixed by the constitution had not yet been extended, and that thereafter, to-wit: at an election of the taxpayers affected thereby, of said City of Helena, held on the 4th day of December, 1899, pursuant to an ordinance in that behalf, duly passed and approved, the question was submitted to said taxpayers affected thereby, whether the limit of indebtedness should be extended ten per cent (10 per ct.) over and above said three per cent (3 per ct.) limit, for the purpose of procuring a water supply and system to be owned and controlled by said defendant, and which

should devote the revenues derived therefrom to the payment of the debt incurred therefor; the last assessed valuation of said city thretofore for state and county taxes being the sum of ten million, seven hundred and forty thousand ($10,740,000) dollars; but that the majority of the taxpayers affected thereby, voting at said election voted "No," and against said proposed extension of ten per cent (10 per ct.), and that as a result thereof, the city council of said defendant was obliged to and did reject said bid and all others received.

That thereafter an election was held on the 18th day of January, 1900, as alleged in the complaint, at which the majority of the taxpayers affected thereby, of said city, voted "Yes," and in favor of extending the limit of indebtedness of said city five per cent (5 per ct.), or in amount six hundred and fourteen thousand, four hundred and seventy-five dollars and fifty cents ($614,475.50), over and above the three per cent (3 per ct.) limit, for the purpose of procuring a water supply and system to be owned and controlled by said city, and which should devote the revenue derived therefrom to the payment of the debt incurred therefor; and thereafter, on the 4th day of June, 1900, by Ordinance No. 477, duly passed by the city council of said defendant, and approved by the mayor on said date, said limit of indebtedness was, in accordance with said vote at said election, duly extended five per centum (5 per ct.) over and above the three per cent. (3 per ct.) limit provided by Section 6 of Article XIII of the consti-

tution of the State of Montana, of the total assessed valuation of the taxable property of said city, as ascertained by the last assessment theretofore for the state and county taxes, to-wit: five per cent. (5 per ct.) of $13,287,510.00, namely, $614,475.50 over and above said limit of three per cent. (3 per ct.), for the purpose of procuring a water system and supply for said city, which shall own and control the same and devote the revenues derived therefrom to the payment of the debt incurred therefor; and that thereafter said defendant, in that behalf by the city council of said city duly authorized, commencing on the 7th day of June, 1900, and ending on the 20th day of June, 1900, advertised daily for sealed proposals, in the said "Helena Daily Independent" for a "water supply," and also for a "water supply and system," to be owned and controlled by said city, in accordance with certain plans and specifications therein referred to and theretofore adopted by the city council of said city, said proposals to be opened on June 25, 1900, at the regular meeting of the city council on said date. That said plans and specifications in said advertisement referred to were as hereinbefore stated. But that no bid or proposal or response of any kind whatsoever to said advertisement was made by complainant herein or by said defendant received from complainant in response thereto.

V.

That the City of Helena contemplates and intends to do all acts and things necessary to secure a water supply and system to be owned and controlled by the said City of Helena, and that it contemplates and intends to raise funds and revenue therefor in the manner provided by law, and to use the same for said purpose, and to furnish and supply the City of Helena and the inhabitants thereof with water from its said plant, and that it contemplates and intends to purchase and secure a sufficient quantity of water for said purpose, and that complainant does not obtain any of its water supply from either Beaver, McClellan or Prickly Pear Creeks.

VI.

That the Ordinances Nos. 467 and 483, mentioned in paragraph 27 of the complainant's bill of complaint, were duly passed and adopted and approved, and that unless said defendant, the City of Helena, is enjoined and restrained from acquiring a water supply, plant and system, it will proceed to acquire the same under said ordinances or such others as are necessary for said purpose, as hereinbefore stated, and will engage in furnishing the said defendant, the City of Helena, and its inhabitants, with water, suitable and proper for its use, and that to do so will depreciate the value of complainant's franchise and property, as stated in paragraph 28 of the complaint, but

that no injury of which complainant can complain will result therefrom if defendant city has the rights claimed by it.

VII.

That the facts stated in paragraphs 29, 30 and 31 of the complainant's bill of complaint are true, except as to the legal inferences and deductions made therefrom, and the further fact that the acts complained of will not result in great and irreparable injury and damage, or any damage or injury to said complainant as a taxpayer or otherwise, unless it be found that the said acts are in violation of the rights of said complainant, and an unwarranted attempt to exercise powers and rights in behalf of said defendant, the City of Helena.

VIII.

It is also agreed that at an election held at said city on the 29th day of July, 1895, it was decided that the limit of the city's indebtedness might be extended under the constitution and laws passed in pursuance thereof, by the legal voters of said city. That thereafter the city council of said city, by resolution duly passed, directed the city clerk to advertise for bids for a supply of water, to be furnished, owned and controlled by said city, in accordance with plans and specifications theretofore adopted, and complied with the requirements of the law in such matters, as hereinabove in paragraph IV stated. That

on the 14th day of December, A. D. 1895, The Helena Consolidated Water Company, predecessor in interest of complainant, commenced its action in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, by which it sought to enjoin the defendant from advertising and receiving bids for said purposes, and to which complaint, defendant, the City of Helena, duly filed its answer; that a restraining order was duly issued, and an appeal therefrom duly taken to the Supreme Court of the State, and by that Court the said judgment so appealed from was reversed and said cause remanded with directions to said trial court to dissolve said injunction and dismiss said complaint; that thereupon a mandate duly issued and said injunction was dissolved and said complaint dismissed and judgment entered accordingly, all of which said proceedings are still in full force and effect and unreversed, and a copy of the pleadings, order for injunction, appeal, judgment and opinion of the Supreme Court are hereto attached and admitted with all the force and effect to which the same may be and are entitled.

IX.

That said defendant City of Helena has made no other efforts under the allegations of paragraph 24 of said complaint, than as herein set forth, and that it proposes and intends to construct and establish a water plant and system, to be owned and possessed by it, prior to the

expiration of the alleged contract and franchise of complainant, at such time as in its judgment and discretion it is feasible and proper so to do, and all actions and proceedings necessary therefor instituted and maintained, and that unless enjoined and restrained from so doing it will, both before and after the expiration of said alleged contract and franchise, furnish and supply the said city and the inhabitants thereof with water. That the revenue for said purpose will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended, in accordance with the requirements of the constitution and provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it has no legal or equitable right to do so, on account of the facts and admissions hereinbefore stated and made.

X.

And it is further agreed that said Ordinance No. 248 is in full force and effect, except in so far as it is or may be affected or modified by the ordinances or resolutions aforesaid.

XI.

And it is also further agreed that all the allegations in the said complainant's bill of complaint, alleged and not denied in the answer of defendant, be and the same are admitted as agreed facts, save and except the legal

inferences and conclusions drawn therefrom by the pleader; and that all denials inconsistent with the facts herein agreed upon be and the same are hereby withdrawn; and said pleadings are made and construed to conform to the facts herein agreed upon.

ASSIGNMENT OF ERRORS.

I.

Appellant has no status or rights, as a taxpayer, to maintain this suit under the pleadings and agreed statement of facts.

II.

It has no rights which have been or will be violated, by the alleged wrongful acts, under the agreed statement of facts, and is not entitled to the relief granted or any relief. There is no obligation, expressed or implied, by which appellee is estopped, in law or equity, from putting in a water plant of its own, or by operating and maintaining the same under Ordinance 248 or otherwise, nor has appellant or will appellant sustain any lawful damages on account thereof, by reason of which the Court erred in rendering the decree herein.

III.

The record shows that appellant, as successor by purchase, of said water plant and franchise, is estopped by the former judgment, in the case of the Helena Consolidated Water Company vs. William L. Steele et al., from asserting its alleged claim in this suit, and that the judgment therein rendered against the predecessors in interest of appellant is conclusive of any and all rights it has to maintain this suit, and that it is bound by the interpretation of said ordinance so made by the court in said action, and was and is not entitled to the decree rendered, and that the court erred in rendering the same.

IV.

The trial court has no jurisdiction herein on account of the pendency of the actions to condemn, or to grant an injunction by which the state court in which the actions were pending is restrained from further proceeding therein, and it erred in holding that it had.

V.

The court erred in not modifying the decree as requested and in passing the same against the objections of appellee, as will appear by its request and bill of exceptions, for that it interfered with the discretion and business functions of the city, and is in direct violation of a reserved right under the ordinance.

VI.

The court erred in overruling appellee's demurrer to appellant's bill of complaint.

VII.

There is manifest error in rendering any decree or granting and injunction in favor of appellant, for that it appears from the pleadings, agreed statement of facts and exhibits, that as a matter of law no right of appellant was violated, or threatened to be violated by appellee, and that appellee was and is entitled to construct and maintain said water plant and use the public streets, alleys and grounds therefor, and because there was no obligation expressed or implied by which appellee was or is estopped from performing the acts complained of.

VIII.

And the court also erred for the additional reasons set out on pages 132 to 134 inclusive, in the record herein.

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ARGUMENT.

We shall discuss the propositions involved, in the order in which they are presented in the assignment of errors by this brief. They are so arranged that the two principal and controlling questions under the *complaint* and agreed statement of facts, are first in order. If these propositions are maintained in favor of appellee, it is quite manifest that no further consideration of errors assigned in the record is necessary. These two propositions deny that appellant has any status as a taxpayer, or any rights, under Ordinance No. 248, that enable it to maintains this suit. If neither of these give to appellant the compulsory process and relief demanded, it has no cause for complaint and its bill should be dismissed.

I.

NO RIGHT TO RELIEF AS A TAXPAYER.

This suit is commenced and prosecuted by appellant, in its dual capacity as a taxpayer and as owner of the franchise granted under Ordinance 248. It bases its claim to relief as a taxpayer upon the proposed illegal expenditure of public moneys by appellee. The allegations of the bill, and upon which appellant must rely, specifies the following facts, upon which it relies:

First—The intended misappropriation of such moneys in the purchase of the water of Beaver Creek.

Second—The unlawful expenditure contemplated in constructing and maintaining a water plant of its own.

Upon the first point, it will be observed that under paragraph I of the agreed statement of facts, it is stipulated "That in the purchase of Beaver Creek water, the warrants issued in payment thereof have been paid, and said warrants were issued in exchange by said city for, and the deeds of conveyance for said waters were delivered to said city upon receipt of said warrants and delivering said deeds as aforesaid, said warrants were presented to the city treasurer on said 3d day of April, 1901, and immediately thereupon said city paid said warrants out of the cash on hand in the city treasury of said city derived from taxes levied and collected for general municipal and administrative purposes, and that it is now the legal owner and holder of the water so purchased."

We shall not stop to argue this past and completed transaction had passed beyond the reach of the injunction sought, or any relief that might be granted under the bill. The state has instituted no proceeding to set it aside, and the object of this suit is not for the purpose of preventing the collection of taxes to reimburse the fund from which the expenditure was made. So that the legality or illegality of the expenditure is of no consequence, being a completed transaction, and no proceeding commenced by which the rights of the parties can be disturbed and the deeds and payment set aside. It is enough to say that the remedy sought and available in this suit is preventive and cannot reinstate the parties to their original condition. This seems to be a complete answer to the bill on

account of the expenditure made for the water of Beaver Creek. It certainly presents no grounds for preventing appellee from constructing and maintaining a water plant of its own, for the purpose of supplying the city and its inhabitants with water.

The second point, concerning the contemplated expenditure of money, and its alleged misappropriation on account of the present indebtedness of the city, and unlawful attempt to construct and maintain a plant of its own, it must be conceded and probably will be, that unless the appellee on account of its obligations under the ordinances is not authorized to put in and maintain the plant, there is nothing in its claim on that account. Unless the right of appellee is taken away by the ordinance, the present indebtedness is of no consequence, as the fund to be raised for that purpose is independent of and in no way connected with or affected by such indebtedness. So it will be seen that, aside from any question of indebtedness, under the constitution and statutes we hereafter quote, a lawful fund to inauguarate and operate a plant to supply the city and its inhabitants with water can be lawfully raised and used for that purpose regardless of the present condition of its indebtedness. Hence so far as appellant's rights as a taxpayer is concerned, it must arise on account of some attempt to unlawfully raise and apply funds. If the acts of appellant as a taxpayer has will not result in the misappropriation of the fund, it would seem in all reason that appellee as a taxpayer has

no right to complain. Indeed it may well be said that if by reason of any contractual rights it has under the ordinance, this expenditure cannot lawfully be made, its remedy lies in the individual enforcement of those rights and not in its character as a taxpayer. This question, however, is met in any and all of its phases by the stipulation upon which the rights of the parties depend.

Concerning the proceedings of appellee and the raising of funds and revenues to install and operate its plant, and the damage or injury that might ensue to appellant as a taxpayer on account of it, the agreed statement of facts show that no misappropriation is intended or to be made, but on the contrary, the same is to be *in conformity with the law*, and not in violation of it.

Paragraph V, record, p. 47, reads:

"That the City of Helena contemplates and intends to do all acts and things necessary to secure a water supply and system to be owned and controlled by the said City of Helena, and that it contemplates and intends to raise funds and revenue therefor in the manner provided by law, and to use the same for said purpose, and to furnish and supply the City of Helena and the inhabitants thereof with water from its said plant, and that it contemplates and intends to purchase and secure a sufficient quantity of water for said purpose; and that complainant does not obtain any of its water supply from either Beaver, McCellan or Prickly Pear Creeks."

As to his damage and injury as a taxpayer, paragraph VII, p. 48, of record reads: "That the facts stated in paragraphs XXIX, XXX and XXXI of the complainant's bill of complaint are true, except as to the legal inferences and deductions made therefrom, and the further fact that the acts complained of will not result in great and irreparable injury and damage or any damage or injury to said complainant as a taxpayer or otherwise, unless it be found that the said acts are in violation of the rights of said complainant, and an unwarranted attempt to exercise powers and rights in behalf of said defendant, the City of Helena.

That portion of paragraph IX, p. 48, of record, concerning the raising of revenue, to construct and maintain its plant, and in which plaintiff as a taxpayer is in any way interested, reads:

"That the revenue for said purpose will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended in accordance with the requirements of the constitution and provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it has no legal or equitable right to do so account of the facts and admissions hereinbefore stated and made."

The constitutional provision under which appellee is constructing its water plant, and the means of raising money therefor, reads, Article XIII, Section 6:

"No city, town, township or school district shall be

allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district, shall be void; *Provided, however,* that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

That portion of the statute enacted under the foregoing constitutional provision, and under which according to the agreed statement of facts appellee is proceeding to construct its plant and raise money therefor, approved March 8, 1897, and containing what is known as the rider, reads, Section 4800,—The city or town council has power:

"64. To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to-wit: erection of public buildings, construction of sewers, brides, waterworks, lighting plants, supplying the city or town with

water by contract, the purchase of fire apparatus, the construction or purchase of canals or ditches and water rights for supplying the city or town with water, and the funding of outstanding warrants and maturing bonds; provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not, at any time, exceed three per centum of the total assessed valuation of the taxable property of the city or town, as ascertained by the last assessment for state and county taxes; provided, that no money must be borrowed on bonds issued for the construction, purchase or securing of a water plant, water system, water supply, or sewerage system, until the proposition has been submitted to the vote of the taxpayers affected thereby of the city or town and the majority vote cast in favor thereof; and, further provided, that an additional indebtedness shall be incurred, when necessary, to construct a sewerage system or procure a water supply for the said city or town which shall own or control said water supply and devote the revenue derived therefrom to the payment of the debt: The additional indebtedness authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, for the construction of a sewerage system, shall not exceed ten per centum over and above the three per cent. heretofore referrd to, of the total assessed valuation of the taxable property of the city or town as ascertained by the last assessment for state and county taxes; and, provided further, that the above limit

of three per centum shall not be extended, unless the question shall have been submitted to a vote of the tax payers affected thereby and carried in the affirmative by a vote of the majority of said taxpayers who vote at such election. It is further provided, that whenever a franchise has been granted to, or a contract made with, any person or persons, corporation or corporations, and such person or persons, corporation or corporations, in pursuance thereof, or otherwise, have established or maintained a system of water supply or have valuable water rights or a supply of water, desired by the city or town for supplying the said city or town with water, the city or town granting such franchise, or entering in such contract, or desiring such water supply, shall, by the passage of an ordinance, give notice to such person or persons, corporation or corporations, that it desires to purchase the plant and franchise and water supply of such person or persons, corporation or corporations, it shall have the right to so purchase the said plant or water supply upon such terms as the parties agree; in case they cannot agree, then the said city or town shall proceed to acquire the same under the laws relating to the taking of private property for public use; and any city or town acquiring property under the laws relating to the taking of private property for public use shall make payment to the owner or owners of the plant or water supply of the value thereof legally determined, within six months from and after final judgment is entered in the condemna-

tion proceedings. For the purpose of providing the city or town with an adequate water supply for municipal and domestic purposes, the city or town council shall procure and appropriate water rights and title to the same and the necessary real and personal property to make said rights and supply available, by purchase, appropriation, location, condemnation or otherwise.

"Cities and towns shall have jurisdiction and control over the territory occupied by their public works and over and along the line of reservoirs, streams, trenches, pipes, drains, and other appurtenances used in the construction and operation of such works and also over the source or stream from which water is taken for the enforcement of its sanitary ordinance, the abatement of nuisances, and the general preservation of the purity of its water supply, with power to enact all ordinances and regulations necessary to carry the powers hereby conferred into effect. For this purpose the city or town shall be authorized to condemn private property in the manner provided by law, and shall have authority to levy a just and equitable tax on all consumers of water for the purpose of defraying the expenses of its procurement."

We have quoted these provisions of the constitution and statutes, not that they are material in so far as appellant's claim as a taxpayer is concerned, as the agreed statement of facts admits that the proceeding to raise the revenue is in accordance with the constitution and laws,

but for the reason that it will be necessary to refer to it later on in this brief.

It is respectfully submitted that in so far as appellant's claim as a taxpayer is concerned, it cannot be maintained, and that any and all rights it has depends upon its contract under Ordinance 248, and the judgment pleaded by appellee as an estoppel.

II.

Rights of Appellant Under Ordinance 248.

It is quite apparent that the injunction sought and granted herein is but a means employed of enforcing the contractual rights of appellant, if it has any, under Ordinance 248. That is to say, if there is an obligation on the part of appellee not to put in a plant of its own and to take water of appellant, expressed or perhaps *necessarily* implied *from what is expressed*, and it is *certain, fair* and *reasonable,* specific performance will be enforced by injunction and appellant's rights to the extent of such obligation in that mode preserved.

To authorize the specific performance of a contract, the uniform rule seems to be, that it must be certain in its terms and mutual in its obligations. We shall undertake, and expect to be able to show to the Court, that under the express terms of the contract or ordinance, appellant is under no obligation to take water for its own use, or use of its inhabitants, and cannot be compelled to do so against its wishes. That is to say, that instead of obligating itself

to take the water of appellant upon which its right to an injunction depends, it has expressly provided against such obligation. That in consideration of the *franchise,* appellee has obligated itself to furnish pure and wholesome water during its existence, if the city and its inhabitants desired to take it, but that there was no corresponding obligation upon appellee to take it. We do not presume it will be contended, and it certainly cannot be successfully contended that it is of any consequence to the appellant how appellee obtains its supply of water, so long as it is under no binding obligation to take of it. In other words, there can be no breach of a contract in that respect, when none exists and no damage can accrue, by a refusal to take it, without any obligation to do so. As we shall see hereafter, appellant's right to enjoin appellee depends upon appellee's obligation to take water of it.

We shall assume as a fact, that under the organic law of Montana as a territory and its constitution as a state, neither the legislative assembly nor any municipality created by it or under its authority had or has power to grant to any corporation any special or exclusive privilege or franchise. There is then, to this extent, such a limitation of power as to forbid and construction of the ordinance that would, in substance and effect, operate as a special or exclusive privilege or franchise under Ordinance 248.

Proceeding now to determine the construction to be given Ordinance 248, as to the obligation of appellee to

take water of appellee for the city and its inhabitants, the cannon of interpretation declared by the statutes in force at the time of its passage should obtain and govern. Section 630 of the Compiled Statutes of Montana, in force at the time of the adoption of the contract or ordinance, and similar to that now in force, reads: "In the construction of a statute or instrument the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein—not to *insert* what has been *omitted*, or to *omit* what has been *inserted*, and where there are several provisions or particulars, such a construction is, *if possible*, to be adopted as *will give effect to all.*"

Section 633 of the same statute and similar to that now in force, reads: "The terms of a writing are presumed to have been used in their primary and general acceptation * * *"

Section 631, like our present statute, reads: "In the construction of a statute the intention of the legislature, and in the construction of the instrument the intention of the parties to is to be pursued, if possible: and when a *general* and *particular* provision are inconsistent, the latter is paramount to the *former*. So a *particular* intent will control a *general* one, that is inconsistent with it."

Section 1 of ordinance 248, upon which this whole contention rests, as we shall hereafter see, reads:

"There is hereby granted to the Helena Consolidated Wated Company, and its successors and assigns, for the full term of twenty years from the passage hereof, the

license and franchise of laying and maintaining water mains and pipes in and through all of the streets, alleys, avenues and public grounds of the City of Helena, for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies or corporations within the said city *desiring* to purchase the same and to said city for fire, sewerage and other purposes, in case said city *desires* to purchase the same, subject, however, to the provisions of this ordinance hereinafter contained, establishing maximum rates, and generally to have and exercise all the rights, privileges and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city, *if required;* provided, however, that nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Company, or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys, and public grounds of said city with water mains and pipes, or the exclusive right of conveying, distributing or selling the same throughout the said city, or of furnishing the same to said city, except as herinafter set forth."

This section of the ordinance gives the appellant the right to sell water at the maximum rates for twenty years, i. e., during the franchise, but it nowhere obligates appellee to purchase it during any portion of said period. On the contrary it *expressly* provides that appellee shall not be required to purchase it, to supply the city or its inhabi-

tants, unless it desires to do so. To assume that under such conditions, *because appellee had heretofore* purchased water and the inhabitants had done likewise, that they are required to continue it against their will, is too absurd and illogical to demand serious consideration.

Hence, under the cannon of interpretation declared by law, which is but an adoption of the general rule, the word *desire* cannot be omitted. Besides being a special and particular provision, with reference to the *obligation to purchase,* and showing a particular *intent,* it controls all general provisions and general intention that might otherwise be implied under the ordinance. We call especial attention to this, as we shall contend that it is conclusive of the merits of this contention under the decision of the Supreme Court of the United States in Skeneateles & Co. vs. The Skeneateles, 184 U. S., 354, quite recently decided.

Under the statutory rule of construction we nowhere find any provision of the ordinance that conflicts with Section 1 in this matter or that cannot *possibly* be reconciled with it. Indeed it may be fairly said that construed together they are in perfect harmony. The only section referring to this matter are confined to the duty and obligation of appellant on account of its franchise and do not change or attempt to change the obligation of appellee with respect to purchasing the water. The only sections that can possibly have any bearing upon this matter are

sections 6, 15 and 26, which we shall consider in the order stated. Section 6 is as follows:

"The said Helena Consolidated Water Company shall furnish and provide a full, ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction), and for other purposes; and such supply shall be full, ample and sufficient for the present population of said city, and for the future population of said city, as the same may be from time to time during the full term of five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use."

In all reason it cannot be claimed that this section is repugnant to, and impossible to reconcile with section 1. It nowhere imposes or attempts to impose any obligation upon appellee to purchase the water. It only defines the obligation of appellant on account of its franchise, and harmonizes in all respect with the express provision of Section 1, by which appellee is not to purchase water during the existence of the franchise unless it so desires. The only possible conflict or repugnancy lies in limiting the obligation of appellant to five years, while the other provisions fix it at twenty, and no rational person will contend that it in any way modifies, changes or affects the express provision we have mentioned, or even relates

to it. In connection with Section 21 it might be construed to impliedly obligate the city to purchase the water "during the full term of five years from and after the 20th of January, 1890." As that period has long since passed the question does not figure in the present contention.

"The said Helena Consolidated Water Company shall, from and after the 20th day of January, 1890, until said system is completed, in accordance with the terms of this contract, furnish the said city of Helena with water for fire, sewerage and other purposes, through the hydrants included in the contract between the said city of Helena and the Helena Water Company and the hydrants on such extensions as have been or may be ordered by the city council of said city, at the price herein provided for; but it shall not be required to complete its system for the conveyance and distribution of water through the twenty miles of mains herein provided for, before the first day of July, 1890."

It is equally plain and manifest that this section in no way affects or relates to the obligation of appellee expressed in Section 1. It refers solely to the obligation of appellant to furnish water during the *construction* period, and defines when the plant is to be completed. It leaves the express agreement of Section 1, that appellee for itself and its inhabitants shall not be required to purchase the water during the twenty years, contained in Section 1, and five years mentioned in Section 6, entirely untouched.

Section 26 reads: "It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof, that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of god, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed."

This section, instead of being repugnant and irreconcilable with the express provision discussed, in Section 1, fortifies and sustains our position that the very essence of the agreement was the furnishing of water in consideration of the twenty years' franchise. It not only has no reference or bearing upon appellee's obligation to take or purchase water of appellant, but on the contrary, in emphatic terms says that the water supplied and distributed shall be "upon the terms and conditions herein expressed," one of which is that appellee shall not be required to purchase or take the water unless it desires to do so. We look in vain for any modification or change of the obligation incurred by appellee, and respectfully submit that it is a great and serious wrong and injustice to construe such obligation to exist.

In this connection we desire to take up the Skaneateles case heretofore referred to, and apply the doctrine there announced to the conditions existing in the present suit.

While we do not concede it to be the law, yet for the purposes of this argument on this point, we shall assume that the appellee had the power to contract to take and purchase water of appellant to supply the city and its inhabitants with water for the full period of twenty years, had it seen proper to do so. The main and controlling question under this head is, can the appellee be enjoined from acquiring water elsewhere, in any lawful manner, in the absence of any obligation not to do so, and in the very face of an express provision in the ordinance, unassailed and unassailable, that it shall not be required to take or purchase water of appellant unless it desires to do so, *i. e.*, under a bare option to take and purchase it.

We here for convenience quote from the statement of the facts, made by Mr. Justice Peckham in the Skaneateles case:

"The action was brought by the water company to restrain the village of Skaneateles and the individual defendants, its officers, from proceeding further with the construction of a waterworks system, or from doing anything in furtherance of the construction or operation of any system of waterworks for that village. The plaintiff claimed that the village ordinance under which the proposed action on the part of the village was taken was void as impairing the obligation of a contract between plaintiff and the village; also, that its action if continued would result in the taking of plaintiff's property without due process of law; that the action of the defendant, if per-

mitted, would result in the taking of private property for public use without compensation; and that such legislation denied to plaintiff the equal protection of the laws.

"The defendants answered denying the contentions of plaintiff, and the case was referred to a referee for trial, who, after hearing the parties, reported that the defendants were entitled to judgment, dismissing the complaint upon the merits, with costs, and judgment was thereupon entered, which was affirmed by the appellate division of the Supreme Court of the State and upon appeal by the Court of Appeals."

The law as originally enacted, and considered in the Skaneateles case, it is true, did not expressly provide, as ordinance 248 does, that the water company shall at all times furnish the city and inhabitants with water. Whether such failure to so provide would release the company from furnishing water on account of its business or franchise is unimportant here. It is enough to know that under the amendment to the law the water company "shall supply the authorities or inhabitants of any town or village * * through which the conduits or mains of such corporation may pass, with pure and wholesome water at reasonable rates and costs," and yet under this provision there was no implied obligation on the part of the village to take and purchase the water, and for that reason the village should not be enjoined from bringing in and operating a plant of its own. What shall be said, then, in the case in hand, where by express provisions of

the ordinance, appellee is not required to take or pay for the water unless it desires to do so?

Will an implied obligation be inferred in this case and an injunction issued, when it was denied in the Skaneateles case, and affirmed by the decision of the Supreme Court? Lacking, then, in every element of trespass or wrong upon the franchise rights of appellant, and there being no obligation to take or pay for the water under ordinance 248, we respectfully insist that the decree should be reversed and the trial court directed to dismiss appellant's bill.

It was not denied upon the trial, and we take it will not be here, but that the appellee before the passage of ordinance 248 had the right to bring in its own plant, but the point is that by ordinance 248 it is disabled from so doing. The conditions are exactly analogous, and the Supreme Court of the United States in the Skaneateles case (184 U. S., 362, 363) uses this language:

"Having before it the above act of 1873, amended in 1877, the Court of Appeals, in *People ex rel. etc. v. Forrest and others,* 97 N. Y. 97, 100, decided in 1884, said that:—'The State authorized the formation of waterworks companies in its town and villages (Laws of 1877, chap. 171), but it does not require one so organized to supply water to the town or village, nor does it require the town or village to take its supply of water from the company so formed.'

"It is true that by chapter 566 of the laws of 1890 it

was provided that the water companies "shall supply the authorities or any of the inhabitants of any city, town or village through which the conduits or mains of such corporation may pass, with pure and wholesome water at reasonable rates and cost;" and the act provided that contracts might be made therefor. But there was no provision making it incumbent upon the municipal authorities to take water from any such company.

"By virtue of its incorporation under this act of 1873 the plaintiff secured simply the right to be a corporation and the authority to lay its water pipes in any of the streets and avenues or public streets of the village of Skaneateles. The village, however, as stated, was under no obligation to take water from the company. That was a matter for subsequent contract between the parties. Admitting that in every grant there is an implication that the grantor will do nothing to detract from the full and complete operation of the grant itself, we cannot find any implication that, after the termination of the contract the plaintiff and defendant were empowered to make, there should be no right in the defendant to build its own system of waterworks under the statute of 1875, unless it purchased or condemned the property of the plaintiff.

"There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far reaching and important in its possible

consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed."

We respectfully submit that the gravamen of the decision is, that there being no obligation in the franchise to take and purchase the water, there could be no damage or injury in a legal or equitable sense, and the village should not on that account be enjoined from bringing in and maintaining its own water plant. In the case before the Court for determination no element of estoppel obtains to prevent appellee from installing its own plant as it proposes to do and is doing, in accordance with the constitution and laws of Montana.

Again, there being no express surrender of the public right of appellee to put in its own plant, but on the contrary, language used which expressly reserves it, how can any obligation be implied by which this right has passed and appellee compelled to desist from bringing in its own plant? Even in cases where such an implied obligation can possibly be created, the rule is declared in emphatic terms in the following cases:

Sedgwick, Statutory and Constitutional Law, page 338, lays down the following doctrine:

"We have seen that the Civil Law inclined to consider grants made by the sovereign with a favorable eye, and to give them an enlarged and liberal interpretation. The Common Law, however, in obedience with its instruc-

tive sympathy with equal rights and its jealousy of prerogative, has always adopted a widely different and much sounder rule. The uniform language of the English and American law is that all grants of privilege are to be liberally construed in favor of the public, and as against the grantees of the monoply, franchise or charter to be strictly interpreted. Whatever is not unequivocally granted is taken to be withheld; all acts of incorporation and acts extending the privileges of incorporated bodies are to be taken most strongly against the companies."

In Charles River Bridge Co. vs. Warren Bridge Co., 11 Peters, 507, Chief Justice Taney, speaking for the Court, says:

"The object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. * * * The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power

then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or *any other affecting the public interest*, the same principle applies, and the rule of construction must be the same."

And Mr. Justice Clifford, in speaking of the above decision in the case of ...ce vs. Railroad Co., 1 Black, 358, 380, says:

"Most of the cases bearing upon the point previously decided were carefully reviewed on that occasion, and, consequently, it is not necessary to refer to them. Judge Story dissented from the views of the majority of the judges, but the opinion of the court has since that time been constantly followed. Later decisions of this court regard the rule as settled that public grants are to be construed strictly and that *nothing passes by implication.* That rule was applied in the case of Mills et al. vs. St. Clair Co. (8 How., 561), and the court say that the rule is, that if the meaning of the words be doubtful in a grant, designed to be a general benefit to the public, they shall be taken most strongly against the grantee and for the government, and therefore should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed, it must fall. Any ambiguity in the terms of the contract, say the court in the case of Richmond R. R. Co. vs. Louisa. R. R. Co. (13 How., 81), must operate against the corporation and in

favor of the public, and the corporation can claim nothing but what is given by the act.—Perrine vs. Chesapeake Canal Co. (9 How., 192). Taken together these several cases may be regarded as establishing the general doctrine that, whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public, and that nothing passes but what is granted in clear and express terms. (Ohio Life and Trust Co. vs. Debolt, 16 How., 435; Com. vs. The Erie & N. W. R. R. Co., 27 Pa., 339; Stourbridge vs. Wheeley, 2 Barn. and Ad., 792; Parker vs. Great Western Ry. Co., 7 M. and Gr., 253.)"

In Leavenworth, etc., Ry. Co. vs. U. S., 92 U. S., 733, the Court uses this language:

"The difference would seem to imply obscurity in the act; but be this as it may, the rules which govern the interpretation of legislative grants are so well settled by the Court, that they hardly need be reasserted. They apply as well to grants of lands to states to aid in building railroads as to grants of special privileges to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object the accomplishment of which it desires to promote, but declines to undertake."

In Slidell vs. Grandjean, 111 U. S., 412, 437, Mr. Justice Field, speaking for the Court, says:

"It is also a familiar rule of construction that where

a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of the terms, or as to the general purpose, that construction should be adopted which will support the claim of the government rather than that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often stated that such acts are usually drawn by interested parties; and they are presumed to claim all they are entitled to. The rule has been adopted and followed by this Court in many instances in the construction of statutes of this description. (Authorities). The rule is a wise one; it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealings with legislative bodies."

Barden vs. N. P. R. R. Co., 45 Fed., 609; 154 U. S., 288.

As we have seen, Section 1 of Ordinance 248, contains the *only* provision concerning the obligation of appellee to take and purchase the water of appellant, and upon which the right to enjoin rests. Under it appellee has expressly reserved the right to not take and pay for the water unless it desires to, and it is nevertheless insisted in the very face of it, that there is an implied unqualified obligation to do so. To raise such an implication is illogical and contradictory under the language used and the

authorities we have quoted. It would be converting a bare option to take, into an absolute obligation, against the *desire* of the party against which it is to be enforced, a direct violation of the obligation of the contract.

The record shows that appellee has no other facilities of obtaining water at present except from appellant, and it defiantly says to appellee, notwithstanding you are under no obligation to purchase water from us, and have expressly reserved the right not to take or purchase it, we will coerce you by injunction from putting in a plant of your own and thereby destroy the provision made for your protection.

If the right not to take water of appellant exists in appellee, the puny quibble as to whether appellee will get it by a plant of its own, or take chances in some other company or individual doing it for them, is too diminutive a resort to control the important and valuable rights involved in this contention. Not being required to take it of appellant it is none of appellant's business, to speak plainly, how appellee obtains it, if lawfully and appropriately done. The record shows that appellee is not even seeking to take water from the streams from which appellant obtains its water, and this is all that should concern it. The plea of estoppel in such cases is as empty as the wind. Appellee has never conceded away its right to bring in and maintain its own plant. Its consent must be obtained before this can be done. Appellant comes into a court of equity and asks to compel this consent in

violation of Section 2120 of the Civil Code, "In taking a grossly oppressive and unfair advantage of another's necessities or distresses." It is seeking indirectly to compel appellee to take the water against *its wishes* and *desires* as manifested by this proceeding. Appellant's hands are not clean.

If the Skaneateles case covers the controlling question, we doubt the propriety of arraying authorities pro and con or attempting to distinguish between them, as the Supreme Court of the United States will be presumed to have done this, and we hesitate in pursuing this question further. Keeping in view the distinction between cases where the matter involved in the invasion of the rights granted under the franchise and the construction of the obligation to be performed by appellee, the decision from which we have quoted seems to stand upon impregnable grounds. While we hesitate to pursue this question further, we deem it proper if not necessary to call the attention of the Court to some authorities in support of the last decision cited.

The law secures to appellee, as we have seen, the right to put in its own plant, and the question is, has it granted away this right.

The mutual and depending conditions under the ordinance are, the right to use the streets and alleys to maintain the system and the right to sell the city and inhabitants water, *provided they desire* to purchase it, at specified rates. It expressly also reserves the right to the

occupancy of the streets, avenues, alleys and public grounds with water mains and pipes and denies the exclusive right to sell and distribute water to the city and its inhabitants.

This Court, in Wright vs. Nagle, 101 U. S., 791, cited in Walla Walla vs. Walla Walla Water Company, supra, p. 18, thus speak of a case reviewed in the opinion in the former case: "The language of the Court in the opinion is to be construed with reference to the question actually under consideration, and should not be extended beyond for any purpose of authority in another and different case."

That the case now before the Court is "another and different case" upon the facts from that presented in Walla Walla vs. Walla Walla Water Company, supra, has already been pointed out, and is manifest from even a casual examination. And that other courts in citing and commenting on the Walla Walla case are mindful that the scope of that decision is limited to the questions actually under consideration in that case is equally clear. Thus in Bienville Water Supply Co. vs. City of Mobile, 95 Fed., 539, 543, the Court says:

"An ordinance was passed by the city council (of Walla Walla) and accepted by the water company, granting to such company, for a term of twenty-five years, the right to lay mains and pies in all the streets of the city, for the purpose of furnishing the inhabitants thereof with water, and entering into a contract with the company for

the same term, by which the city agreed to pay certain rentals, and bound itself not to erect, maintain or become interested in waterworks unless the contract should be avoided by the judgment of a court of competent jurisdiction on the ground of a substantial failure of performance by the company. The language of the contract is that, 'until such contract shall have been so avoided, the City of Walla Walla shall not erect, maintain or become interested in any waterworks.' The water company substantially complied with the terms and conditions of the contract, which was still in force at the time the bill was filed. After this contract had been in force, and the stipulated rentals paid, for about six years, an ordinance was passed to provide for the construction of a waterworks for the purpose of supplying the city and its inhabitants with water, and to issue bonds to provide the necessary funds. The Supreme Court said, in substance, that the contract amounts to this: If the city should desire to establish waterworks of its own, it would do so by condemning the property of the company, and making such changes in its plant or such additions thereto as it might deem desirable, but that it would not enter into a direct competition with the company during the life of the contract; that, so long as the contract had not been avoided by a court of competent jurisdiction, as provided in the contract, but remained in force, the city had no right to establish waterworks, because it had so covenanted with the water company, and the injunction was sustained."

"Thus we have seen that the contract, in every case to which our attention has been called, either provide for an *exclusive* right in the water company to supply water to the city and its inhabitants, granted or contracted for by the city, or *contained a covenant by the city that it would not* erect waterworks of its own, and would abstain from granting the right to do so to a competing company during the life of the contract. We have seen that the contract under consideration in this case contains no such stipulation or agreement. We have seen that it does not attempt to grant any exclusive right to the complainant, and that it contains no provision that the complainant shall furnish water to the inhabitants of the City of Mobile, and no covenant by the city that it will not build or acquire waterworks of its own, or abstain from supplying water to its inhabitants, during the continuance of the contract. The parties might have made such a contract but they did not do so."

This case was affirmed on appeal to the Supreme Court of the United States, 175 U. S., 110.

In Iron Mountain R. Co. vs. City of Memphis, 96 Fed., 113, the Court thus speaks of the Walla Walla case:

"The water company filed a bill to enjoin the City of Walla Walla and its officers from erecting waterworks in pursuance of an ordinance of the city to that effect. The water company had a contract with the city by which the city stipulated that during the terms of its contract it should not erect, maintain, or become interested in any

waterworks, except the one provided for in the contract, which it was given power to condemn. Subsequently the city passed an ordinance for the erection of new waterworks, and the question was whether that was a law impairing the obligation of a contract such as to give a federal court jurisdiction to enjoin its enforcement."

* * * * * * * * *

"In the Walla Walla case, cited above, it is difficult to see in whatrespect the ordinance of the city directing the construction of waterworks impaired the obligation of the prior exclusive grant, except in that it was an express breach of the covenant of the city in the grant that the city would not construct waterworks of its own, but would buy those of the grantee."

In University vs. Village of Canandaigua, 96 Fed., 449, 452, 453, the Court said:

"In the Walla Walla case, 172 U. S., 1, there was an *express* agreement on the part of the city not to build waterworks of its own during a period of twenty-five years,—the terms of the contract. The provision being that, while the contract was in force, 'the City of Walla Walla shall not erect, maintain, or become interested in any waterworks except the ones herein referred to.' The court decided that this stipulation was not ultra vires and that it was a palpable violation of its provisions for the city to construct a system of waterworks of its own while its contract with the company had nineteen years to run.

If the village of Canandaigua had covenanted with the water works company that in no event would it erect waterworks of its own until after the year 1909 the two cases would be analogous."

In Little Falls Electric & Water Co. vs. City of Little Falls, 102 Fed., 667-8, the Court says:

"As to the showing to the effect that the City of Little Falls is taking steps to construct a plant for the supply of water and electric light, it appears that the complainant's franchises are not exclusive, and that there was not, as in the Walla Walla case, above cited, any contract on the part of the city that it would not, during the term for which the franchises were granted, erect, maintain or become interested in other like works."

See also—

North Springs Water Co. vs. Tacoma, 47 L. R. A., 214.

Thompson Houston Electric Co. vs. Newton, 42 Fed., 723.

State vs. Hamilton, 47 Ohio St., 52.

Hamilton Gas L. & Coke Co. vs. Hamilton City, 146 U. S., 258.

Long vs. Duluth, 49 Minn., 280.

Westerly Water Works Co. vs. Westerly, 80 Fed., 611.

Skaneateles Water Works Co. vs. Skaneateles, 161 N. Y., 154; 46 L. R. A., 687.

We submit that neither the facts presented, nor the language used in the Walla Walla case, can be said to sustain complainant's claim that the appellee in this case agreed not to erect water works of its own.

There is another and graver objection to the claim now made that this appellee when it granted to complainant the franchise under which it now exists, by necessary implication covenanted with complainant not to erect or become interested in water works of its own during the life of said franchise. It can hardly be questioned but that when this appellee granted complainant the franchise contained in ordinance No. 248, it acted as the agent of the State in granting a franchise vested in the State.

Walla Walla case, 172 U. S., 1.

New Orleans Water Works Co. vs. Rivers, 115 U. S., 680, 681.

And in the construction of all such grants and franchises the rule is well settled that the grant or privilege must be clearly conferred and that all doubts and implications will be resolved against the grant or privilege claimed and in favor of the grantor. Thus in the case of Bartholomew vs. City of Austin, 85 Fed., 359, a case in its essential features much like the present, the Court said:

"The contract on which this action is based is a grant and privilege for a period of twenty years to the City Water Company to supply water to the City of Austin, and the inhabitants thereof, with the right of extension under certain named contingencies. The grant is not in terms an exclusive one, and, so far as the language used is concerned, there is nothing to hinder the City of Austin from erecting other and competing works, nor from granting to others the right to use the streets, nor from contracting with others for the furnishing of more water, as the needs of the city may require. It is very well settled that, in contracts with states or municipalities conferring powers, grants, or privileges on private corporations affecting the general rights and interests of the public, the grant or privilege must be clearly conferred, all implications, doubts, and ambiguities being resolved against the grant or privilege claimed."

Richmond F. & P. R. Co. vs. Louisa R. Co., 13 How., 71, 81.

Rice vs. Railroad Co., 1 Black, 358, 480.

Stein vs. Supply Co., 141 U. S., 67, 80.

To the same effect are:

Barden vs. N. P. R. R. Co., 154 U. S., 288, 325-6.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685, 696.

Deroit Citizens' Street Ry. Co. vs. Detroit R. Co., 171 U. S., 48.

Freeport Water Co. vs. City of Freeport, 180 U. S., 587; 21 Sup. Ct. Rep., 493.

In support of their position that in granting the complainant its franchise found in ordinance No. 248, appellee impliedly agreed not to erect, maintain or become interested in water works and a water supply of its own, counsel rely for the most part upon certain expressions found in the opinion in the Walla Walla case and in the Joplin case.

In concluding this citation of authorities we call especial attention of the Court to City of Austin vs. Bartholomew, 107 Fed., 349. On page 352 that Court, through Justice Newman, says:

"Newman, District Judge, after stating the facts as above, delivered the opinion of the Court.

"The first and most important question for consideration in this case is that raised by the contention that the city, by the construction of water works of its own in 1895, violated the contract which it entered into with the City Water Company in 1882, to the wrong and damage to its successor, the Austin Water, Light and Power Company. The claim is that it was necessarily implied in the terms and provisions of the contract referred to that the city would not itself erect a system of water works, and thereby, to a large extent, destroy the value of the prop-

erty of the City Water Company. Reliance is placed largely, perhaps mainly, on the case of City of Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, Sup. Ct., 77, 43 L. Ed., 341. Much stress is laid also on the recent case of Southwest Missouri Light Co. vs. City of Joplin (decided by Judge Phillips in the Circuit Court of the United States for the Western District of Missouri in March, 1900), 101 Fed., 23. In this latter case the pertinent authorities are cited and reviewed, and in its reasoning and conclusions it is undeniably favorable to the contentions of the receiver in this case. In the case of City of Walla Walla vs. Walla Walla Water Co., supra, there was an express stipulation that the city would not erect water works of its own, although it is true that the reasoning of the court and the conclusions reached are not based entirely on this stipulation. We think, however, that the recent case of Bienville Water Supply Co. vs. City of Mobile, 175 U. S., 109, 20, Sup. Ct., 44 L. Ed., 92, being later than the Walla Walla case and more like this case in its facts, is more pertinent here.

"In this latter case the court affirmed the judgment of the circuit court in dismissing a bill which set up on behalf of the Bienville Water Supply Company against the City of Mobile substantially the same facts which are relied upon by the plaintiff here. The effect of this decision by the Supreme Court in the case of Bienville Water Supply Co. vs. City of Mobile, is emphasized as authority in this case in favor of the right of the City of

Austin to erect water works of its own by the opinion filed in the Circuit Court by Judge Toulmin (95 Fed., 539), which opinion was in review in the Supreme Court and apparently fully approved. The syllabus of the opinion in the Circuit Court is as follows: 'A contract between a city and a water company, chartered and given the right to lay its mains in the streets of the city by an act of the legislature which merely bound the company to maintain a certain number of fire hydrants, for which the city agreed to pay a specified rental for a term of years, and fixed a maximum price, beyond which the company agreed it would not charge for water furnished for domestic use during the term, but which contained no grant of any privileges to the company and no contract for furnishing water to the inhabitants of the city, nor agreement that the city should not do so, is not violated by the erection or purchase of water works by the city for the supplying of water to its inhabitants and for its own use, and affords no ground for an injunction to restrain the city from so doing in pursuance of authority contained in its charter, the city not having refused to pay the stipulated rentals.'

"But it is not necessary to further elaborate this question, as it is *res judicata* in this court. In the former opinion in this case (85 Fed., 359), by Judge Pardee, it is said: 'The contract on which this action is based is a grant and privilege for a period of twenty years to the City Water Company, to supply water to the City of

Austin, and the inhabitants thereof, with the right of extension under certain named conditions. The grant is not in terms an exclusive one, and, so far as the language used is concerned, there is nothing to hinder the city of Austin from erecting and completing, nor from granting to others the right to use the streets, nor from contracting with others for the furnishing of more water, as the needs of the city may require. It is very well settled that in contracts with states or municipalities conferring powers, grants or privileges on private corporations affecting the general rights and interests of the public, the grant or privilege must be clearly conferred; all implications, doubts and ambiguities being resolved against the grant of privilege claimed.'—Citing Richmond, F. & P. R. C. vs. Louisa. R. Co., 13 How., 71, 81, 14 L. Ed., 55; Rice vs. Railroad Co., 1 Black, 358, 380, 17 L. Ed., 147; Bank vs. Skelly, 1 Black, 436, 445, 17 L. Ed., 173; Stein vs. Water Supply Co., 141 U. S., 67, 80, 11 Sup. Ct., 892, 35 L. Ed., 622."

And on page 353, it is said, "we shall adhere to the former ruling of the court on this question, which disposes of the claim of the receiver for general damages against the city for breach of contract," and the judgment of the Circuit Court was affirmed. But above all, this issue must be decided under the particular provisions of Section 1 of ordinance 248, which *expressly* confers an *option* instead of an *absolute obligation,* and, unless authorities are produced that by judicial construction it

can be changed by implication to an absolute and unqualified obligation, we apprehend none will be applicable. If we are right in the construction of the *ordinance* under the rules laid down by the statute at the time of its adoption, the matter is placed beyond doubt, while the same results would follow from the doctrine announced in the Skaneateles case.

Even assuming the law to be that where there is no obligation on the part of the water company to furnish the city water, that no obligation to take it can be implied and that e-converso where there is an obligation to furnish it, there is an implied obligation to take it. The main point yet remains to be determined: Has the city not the right to limit its obligation to take, to an option, and if so, has it done it in *this* case? It cannot be assumed that an obligation to furnish unalterably fixes the duty to take and places it beyond the power of the parties to contract in reference to it. The matter is not contrary to public policy, or good morals. Is it unreasonable that the city should not want to bind itself to take the water for the period of twenty years? Because it has taken it for a while when it *desired* to do so, is it compelled to continue it against its will? Indeed the conclusion is irresistible, under the *terms* of the ordinance, that appellant, inconsideration of the franchise, is required to furnish water to the city and its inhabitants for twenty years, but that the city is not required to take it, unless it sees proper to do so, with or without a plant of its own.

It has a right reserved in the ordinance to put in its plant in the meantime, and the fact that it has done so, or will exercise the right to do so, cannot impair or interfere with this option. The option carries with it, as an incident, all the means necessary and proper to make it available, chiefly among which is installing the plant upon which this injunction operates. The maxim is "*Accessorium non ducit sed sequitur sum principale.*" No inference should be drawn or implied that will defeat the express terms of a valid and reasonable contract.

The city must be conceded the right to contract for water for the inhabitants, to give appellant any standing whatever under the ordinance. Assuming for the purposes of this argument that it has such right, it follows that the inhabitants have a right to consider it as a source of securing a supply. It makes it a legitimate business, and the inhabitants must have some rights in this matter.

The city may contract for a water supply for itself, and *possibly* the doctrine of estoppel would apply to it. But can it go further in contracting for water for the inhabitants than securing them a supply? Can it obligate them to take the water when so supplied any more than it can contract for other domestic and family supplies and require them to take them? It has the right under the law of its creation to contract for a supply of water for the inhabitants, but it is carrying the matter a long way to say that the privilege of taking it or not is swept away. The city cannot grant any exclusive privileges, as against

the inhabitants, becaus it does away with competition, to which they are entitled. This being so, they are entitled to have all lawful competitors engage in the business that desire to do so. Hence, it would follow that as the city had the right to furnish the inhabitants, and the inhabitants had a right to full competition, it is against public policy to allow the city to contract not to engage in furnishing the city with water for twenty years, and the law, even disregarding the express provision that neither the city for itself or its inhabitants shall be required to take it unless they desired to do so, would never raise an *implied* agreement that they had so contracted. But under the rule of construction laid down in such cases, when public rights are to be granted away, we can nowhere find that the city has contracted to surrender its rights to furnish the inhabitants with water. We find that in Section 1 of the ordinance, on the contrary, the only place in which the obligation of the city is referred to, that it expressly provides that it shall be at its option to take during the existence of the franchise, *i. e.*, is subject and limited to its desires in that particular. An implied contract is never implied in the face of a valid, reasonable express provision. To permit this would present a clear case of the tail wagging the dog.

* * * * * * * *

To avoid the force of the reservation contained in Section 3, it is also claimed that it is nothing more than a

declaration that the franchise is not exclusive, and secures only the right to occupy the streets with its pipes and mains, but that it is precluded from he use of them in supplying the inhabitants of the city with water. No one questions the power of the city to put in water works for itself and its inhabitants, because both are of a public nature. The contention is that it has ceded away this right by the terms of the ordinance. The sum and substance of the argument is that the right thus reserved is limited to constructing the works, but that it is inhibited by the ordinance to the use of them as a supply of water for its inhabitants. This is directly in conflict with the universal maxim that the full beneficial use is incident to and passes with the grant. Besides, the constitution contemplates the raising of funds from the revenue derived from the sale of water, as one of the means of paying off the indebtedness incurred in installing its works. It was manifestly not contemplated that the city would sell water to itself but get this revenue from the sale of water to its inhabitants. So the theory of construction contended for is not only in conflict with the general maxim that the right to put in works carries with it all the beneficial and lawful use of them, but is directly in conflict with the whole purpose and object of the works as thus contemplated by the constitution. The learned solicitors for appellant, to emphasize their position, italicize that part of Section 3, which reads, "*So long as such franchises, rights and easements do not interfere with the franchises, rights and ease-*

ments hereby granted,'' thereby assuming that this reservation, if given its literal construction, would conflict with such franchise, rights and easements. This is just what we claim. If given the construction urged by appellant, it is in direct conflict with this express provision, and the implication urged does not for that reason arise. We look in vain for any express provision depriving appellee of the rights it is seeking to avail itself of, and the point is that no implication can arise in the face of the express terms of this reservation. We cannot ignore the beneficial use of the right expressly reserved to enable the implied obligation claimed to obtain. Where there is manifest repugnancy, as is the case here, the latter gives way and the former prevails. The right to bring in water for the city and its inhabitants carries with it the right to furnish it to them, and especially is this so under the constitution and laws. It is difficult to argue the question that, notwithstanding the city has reserved the right to put in the plant, yet there is an implied obligation that it will not utilize it. Indeed the reservation of the right to construct or *maintain* works and plants of a public nature is but an emphatic way of expressing what had theretofore been implied by the express provision that the franchises granted should not be conclusive, and that neither the city for itself or for its inhabitants was under any obligation to take water of appellant. The case in a nutshell is that the express reservation was intended to and does repel the implication claimed, and removes the matter beyond

doubt. The grant of power to the city enabled it to put in and maintain these water works because they were of a public nature, and for like reasons, it is retained by the reservation.

If we admit what is inferentially conceded, that the right to construct and *maintain* the works is reserved by the section, and yet the right to sell water to the inhabitants is forbidden by the ordinance, then, of course, there is repugnancy between the express reservation and the implied prohibition, because it is a part of the franchises, rights and easements granted. But if the implication does not arise, so as to create the repugnancy, all the provisions are in harmony and, as suggested, they must be construed *in pari materia*. There is no repugnancy if the contract is left as the parties made it, and the rule is, the court will not insert what is omitted, or omit what has been inserted, and give it such construction, if possible, as will avoid the repugnancy. To make the implication insisted upon, under present conditions, is doing no more or less than ignoring the contract made by the parties, and creating a new and different one for them. We claim that under the best considered cases the implication does not arise, without the reservation, and that with it, if water works to supply the inhabitants of the city with waer are of a public nature, it is impossible for such an implication to arise. If they are of a public nature, the right cannot be taken away without violating the obligation of the contract. Appellee had the right to put in

the works before the contract was made because they were of a public nature, and by the express terms of the contract it has reserved it. To say that the right to construct and *maintain* water works to supply the inhabitants of the city with water does not comprise the right to dispose of it to them, is too manifestly inconsistent and contradictory for serious consideration, and especially is it so when considered in connection with the constitution heretofore quoted, which makes such disposition of the water the very source of revenue in constructing and maintaining the works.

Of all the words in the English language "*maintain*" is perhaps the most appropriate in this connection, as the works are to receive their support from the revenues derived from sales of water to the inhabitants under the constitution. Without this incident the city, for itself and for its inhabitants, is utterly powerless to construct or *mainain* its own water works. It is as inconceivable as for the plant to flourish without the support of the soil from which it sprang.

Solicitors conclude by calling attention to the fact that the city is not enjoined from putting in a plant for municipal purposes. This is a potent reason why it should not be enjoined from doing so for the inhabitants, as this is the source of revenue under the constitution. The implied obligation urged applies with full force to the city in the exercise of the power conferred in both instances. The sections of the ordinance are equally applicable to both

propositions. The decision theretofore made giving the city the right is equally applicable to the exercise of the right for the benefit of its inhabitants. It is a precedent, like a decision concerning a series of bonds. What is applicable to one is applicable to the whole family of bonds. Precisely the same reservation applies to the city in the one case as in the other, and it is comprised in the express provision that nothing contained in the ordinance should be so construed as to preclude the city from constructing or *maintaining* works of a public nature. The works are of a public nature, and that ought to end it.

* * * * * * * *

Here we call attention of the Court to the motion to dismiss under a decision of this Court made since preparing this brief, in point upon the questions argued, and insert it for convenience:

MOTION TO DISMISS OR TO AFFIRM.

Now comes the appellee in the above entitled suit, and moves the Court to dismiss the appeal therein, for that it manifestly appears from the record, that it has no jurisdiction to hear and determine the same upon the merits thereof:

I.

The decision from which the appeal is taken is not based and does not rest upon the construction of any act

of Congress or interpretation of any provision of the Federal Constitution.

II.

It is apparent from the record that the franchise contract contains no obligation, expressed or implied, upon which the alleged error of appellant, in volving a Federal question, can rest.

III.

The constitutional provisions invoked by appellant are in no wise involved under the franchise contract so as to confer jurisdiction upon this Court.

IV.

Appellee, in connection with its motion to dismiss for want of jurisdiction, also moves the Court to affirm for that it manifestly appears from the record that the appeal was taken for delay only, and that the question upon which the jurisdiction depends is so frivolous as not to need further argument.

EDWARD HORSKY,
City Attorney,

EDWIN W .TOOLE, and
THOMAS C. BACH,
Attorneys for Appellee.

(TITLE OF COURT AND CAUSE.)

NOTICE OF SUBMISSION OF MOTION.

To Messrs. M. S. Gunn, and Carpenter and Carpenter, Counsel for Appellant:

Please take notice that on Monday, the 21st day of February, 1904, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

EDWARD HORSKY,
City Attorney,

EDWIN W .TOOLE, and
THOMAS C. BACH,
Attorneys for Appellee.

Receipt of the foregoing notice of motion, and receipt of a copy thereof, together with receipt of copies of the brief of argument therein referred to, are hereby acknowledged and admitted this 30th day of January, A. D. 1904.

M. S. GUNN,
B. PLATT CARPENTER,
STEPHEN CARPENTER,
Counsel for Appellant.

(TITLE OF COURT AND CAUSE.)

BRIEF.

In support of the foregoing motion appellee respectfully submits the following points and authorities:

I.

The pleadings and records show that on the 15th day of January, 1890, the City of Helena adopted ordinance No. 248 (Exhibit "A," Record 9), which was duly accepted by the appellant. In it was contained a franchise. Appellant claimed that said franchise contained certain "implied" obligations on the part of the city, and upon the existence of these alleged obligations and the alleged violation thereof, the right of this appeal depends. Under the organic law of the Territory of Montana its legislative assembly was at that time prohibited from passing any law "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." The constitution and laws of the State are in line with this theory, and the laws of the territory followed the organic law.

"The legislative assembly shall not pass any local or special laws in any of the following enumerated cases, that is to say: * * * granting to any corporation, association or individual, * * * any special or exclusive privilege, immunity or franchise whatever."

Montana Const., Article V, Sec. 26.

Aside from all this, the very terms of the franchise contract emphatically declare that no such rights are conferred. While in consideration of the franchise contract it exacts certain duties of the appellant, it nevertheless expressly provides: "That nothing herein contained shall be construed so as to give to the Helena Consolidated Water Company, or its successors or assigns, the exclusive right * * * of conveying, distributing or selling the same throughout the said city or of furnishing the same to the said city except as herein set forth."

Ord 248, Fol. 18, 19, page 10.

"Nothing contained herein shall preclude said city of Helena from regrading or changing the grade of any street or streets within said city, or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting, giving or granting any franchises, rights or easements to any person or persons, corporation or corporations, whomsoever, so long as such franchises, rights and easements do not interfere with the franchises, rights and easements hereby granted."

Section 3, pages 10, 11.

"Provided, always, that said company shall not refuse to permit connections to be made by or to sell and deliver water to any persons who shall offer to pay for the same and shall comply with the provisions of this

ordinance, and with such regulations as may be from time to time prescribed by the city council of said city, and the reasonable rules andl regulations of said company."

Section 17, page 15.

"It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidatd Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed."

Section 26, page 18.

It is manifest that there is no inhibition to prevent this provision of the franchise contract and that the parties are bound by it. There is therefore a franchise contract by which the appellant is allowed to furnish water to the inhabitants, if they desire to take it at the maximum rates fixed. This brings the question involved squarely within the decision of this Court in

City of Joplin, appellant, v. Southwest Missouri Light Company, reported in Advance Sheet, Supreme Court of the United States Reports, December, 1903, No. 32, decided November 16, 1903.

In this case Mr. Justice McKenna, in speaking for the Court, in terse and potential language, says: "The limitation contended for is upon a governmental agency and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights, and against limitations upon the powers of government."

The substance of the decision is that, as in the case at hand, there is neither an express or implied obligation not to put in competitive works.

II.

There is but one other question, therefore, left to consider: If the record shows that there is no violation of any obligation of the franchise contract upon which a constitutional question is involved, there being no act of congress applicable or to be interpreted, it logically follows that the Court will say that there is no jurisdiction except to dismiss the appeal.

This would seem to be the logical conclusion. It is a condition precedent to the exercise of jurisdiction and it would be a hard proposition to maintain that the juris-

diction could be sustained without it. It goes without saying that there is no express or implied obligation upon which to rest a constitutional question. Upon this preliminary proposition depends the jurisdiction of this Court to reach the Federal question and pass upon its merits. If there is no obligation in the franchise contract to be violated in respect to the matters contended for it cannot in reason be said that any constitutional question can possibly be involved. The whole matter is solved in the interpretation of the franchise contract and no pretension is made that any act of Congress or its interpretation is involved and the jurisdictional question depends solely upon the proposition as to whether there exists any obligation to be violated.

When an appeal is taken and the error assigned is based upon the violation of one of the obligations of the contract, and it is manifest from the record that no such obligation exists, the Court has no power or jurisdiction except to dismiss the action and no inquiry into the merits can be had or required. Whether the alleged error referred to the remedy or the violation of the obligations of a contract would of course be without merit, as the condition precedent upon which it must rest does not exist. So it is apparent, there is no obligation, express or implied, upon which to predicate a constitutional question, upon which the error is assigned. Should this case go to final hearing it would seem that all this Court could

do would be to dismiss the appeal, and that is just what is asked by the motion.

Conceding that notwithstanding the decisions heretofore made in this case this Court can and will consider the question of the obligations contained in the contract as germane to the jurisdictional question, it still remains a preliminary and conditional one upon which such jurisdiction depends. If it can properly be decided upon this motion, the necessity of such a speedy determination is potentially suggested from the very nature of the controversy, and facts contained in the record. If it is apparent from the record that all that could be done upon a final hearing would be a dismissal of the appeal for want of jurisdiction, it would seem that this motion should be sustained. We have assumed, of course, if this motion is proper, the Court upon final hearing could not affirm or reverse the judgment and enter any other order than that dismissing the appeal.

The appellee respectfully submits that the points made in this motion are fully and unequivocally sustained by the following authorities:

Moran v. Horsky, 178 U. S., 205.

St. Paul Gas Light Co. v. St. Paul, 181 U. S., 142, 147.

New Orleans Water Co. v. Louisiana Sugar Refining Co., 125 U. S., 18.

City of New Orleans v. New Orleans Water Works Co., 142 U. S., 79.

New Orleans Water Works Co. v. Louisiana, 185 U. S., 336, 345.

Mobile and Ohio Railroad Co. v. Tennessee, 153 U. S., 486.

Hamblin v. Western Land Co., 147 U. S., 532.

Wilson v. North Carolina, 169 U. S., 595.

Muse v. Arlington Hotel Co., 168 U. S., 430, 435.

Shreveport v. Cole, 129 U. S., 36.

McCain v. Des Moines, 174 U. S., 168.

If this Court is of the opinion that there is no express or implied obligation in the franchise contract, upon which a constitutional question could rest, and that the decision of the trial and appellate court rested upon those grounds and none other, then it logically follows that it is based properly upon grounds independent of the constitutional question sought to be raised. It may be regarded as incidental in a sense to the constitutional question, yet it is preliminary to the jurisdiction and must be determined in advance whether on motion or at the final hearing. While we are not able to find authorities *directly* in point upon the question in hand, the reasoning and analogy in the cases cited seems to be so complete as to remove all doubt of their applicability and

controlling effect. It would seem that the question of jurisdiction ought always to be considered and determined at any stage of the case, especially where it is presented and a ruling upon it requested.

But little further need be said in support of the fourth ground of this motion.

The assumption that competition when not *limited* or *restricted* is taking the property of a competitor without compensation or due process of law is too absurd and contradictory to require argument to refute it. The *power* of the city under the constitution and laws to make a franchise contract reserving the right to put in competitive works and plants, cannot be doubted, and that it has done so is beyond question. It logically and emphatically follows that the appeal, which depends *entirely* upon the violation of the obligations of the contract, in putting in said works, is clearly frivolous, and cannot be maintained upon the same grounds, under the facts in this case, that it was contended for below.

The correct doctrine certainly is, as announced by this Court in the Joplin case, that the right to put in such works or plants of a public nature exists without such express reservation. What then can be said of the good faith of an appeal taken and sought to be maintained in the very face of the express provision of the franchise contract that provides it shall not be exclusive, and that the city reserves the right to put in any works or plants of a public nature. And the power to cede away *such a*

right necessarily remains with it as a public right, and the *power* to reserve it is simply a retention of then existing right. The act of Congress involving this appeal must, of course, depend upon, whether it involves *construction* or *application* of, the Constitution of the United States. No question of constitutionality of any Federal law, or the construction of any treaty entered into under its authority, is brought in question, nor is the Constitution or the laws of the State claimed to be violated.

Appellant assumes that there is an implied contract that its franchise shall be exclusive, but the express provision of the contract is that it shall not be. It assumes that there is an implied obligation that the city will not put in its own plant or works, but the express terms of the contract provide that the city may do so. As certain as the city possesses the power to confer the right claimed, that certain it is it could retain it, and this it has done.

The whole question, therefore, in the fourth ground of the motion, is confined to the proposition whether an appeal sought to be maintained, fairly and squarely, in the face of the primary rights of the parties, does not come within the language and meaning of the rule upon which the motion in this respect applies. We respectfully submit that it does. It goes without saying, if the franchise contract has no express or implied obligation by which the appellee is not entitled to put in a competitive plant of its own, then there is no obligation to be violated and in the very nature of things could be no taking of

property without just compensation or due process of law. If, therefore, the Court should be of opinion that this question is so intimately connected with or incidental to the constitutional question that it might properly be considered upon the final hearing, we respectfully submit that the grounds upon which the constitutional question rests are absolutely frivolous and brings the case clearly within the provisions of Subdivision 5 of Rule 6 of this Court.

The Joplin case, to which we have heretofore referred, conclusively settles the legal proposition involved; besides, in this appeal it appears in the record that the franchise privileges could not be made exclusive under the constitution and laws of the State, and by the express provisions of the contract itself no such rights are conferred or intended to be conferred. Aside from this it is expressly provided, as we have seen, that it shall not be exclusive or prevent appellee from constructing or maintaining sewers or other works or plants of a public nature.

We take it that this rule of Court was intended to meet a case like this, where a corporation had secured the suspension of the exercise of the powers and privileges of a city to install water works of its own. If the case presents one that is frivolous and cannot be maintained, this motion will be granted and the rights secured to the city afforded to it; otherwise great and serious injustice might result.

While in the argument upon the motion to dismiss

or affirm we have relied to a very great extent upon the fact that the right to install a plant of its own and operate the same, is a constitutional right, in the interest of the public, which cannot be frittered away under the guise of a contract, yet by the express terms of the contract it has been retained and reserved. In this we have gone further than was necessary under the decisions and reasons which control this case. The real and paramount point is, that the city has not expressly attempted to grant away this right and that in the absence of these reservations, under the rule of law applicable, no implied obligation will be indulged in the face of the fact that no exclusive privilege of selling the water could be or was attempted to be granted.

* * * * * * * *

THE MANDAMUS CASE.

It will be observed in this connection that appellant has pleaded the judgment in this action as an estoppel, in that it establishes a *contractual* obligation on the part of appellant to furnish water to the inhabitants, and that on this account there was and is an implied obligation that the city would not bring in a plant of its own, and it now seeks to prevent it from doing so. We concede that appellant, succeeding to the rights of the Helena Consolidated Water Company under its purchase at judicial sale, is entitled to the benefit of this judgment and that it is avail-

able under the stipulation for just what it is worth. This necessarily involves the consideration of the extent and scope of the judgment. Appellant's predecessor was a corporation organized under the laws of the State of Montana and subject to its laws.

As shown by its articles of incorporation, its object was, among others, to secure a franchise to lay its pipes and sell water to the City of Helena and its inhabitants. It in no way contemplates an exclusive privilege to sell water, but the privilege of doing so under its franchise. Its complaint avers that it has an abundant supply for that purpose and the agreed statement of facts concedes it to be so.

The statute in force at the time and now in force required the predecessor in interest of appellant to sell to any one desiring to purchase, when it had water, upon the tender or payment of the customary rates. It would be its *duty* to do this, on account of its franchise and right of eminent domain, without such provision, as much as it is the duty of a railroad to carry freight and passengers when it has the facilities to carry them. And it may be said in so far as the public duty and right is concerned, the inhabitants are no more obligated to purchase the water of appellant than one desiring to travel or freight goods is to transport and freight by the railroad. Now while appellant is a foreign corporation under the constitution and laws of the State of Montana, it is not entitled to any greater privileges and exemptions than a local

corporation and any duty to the public, therefore, is required to be performed as though it were a local corporation. Hence it is clear to be seen that a public duty may be involved in contradistinction to an obligation arising out of an agreement. The duty arising in the former is enforced by mandamus and the latter in many cases by injunction and various other equitable remedies. And so it is, to enforce this *duty* as distinguished from an *obligation* arising from an agreement, resort was had to an *action* as it is denominated under our code for a writ of mandamus. It follows that the scope and extent of the judgment is limited to the sphere and subject matter involved, *i. e.*, the public duty as distinguished from *obligations* arising out of agreements. The result is that the adjudication is to the effect that it is a public duty which appellant's predecessor owes the city as distinguished from an obligation arising from an agreement.

But we are not confined alone to this as a legal or logical sequence. The *judgment* and decision of the court *in fact decides* this *very* question, and as successors in interest to the plaintiff in that case it is an estoppel between the parties here, upon the question *actually decided*. In the very able decision of the trial judge and as a finding upon which the judgment pleaded is based, on page 207 of the record, he uses this language:

"I am of opinion, then, that pending the settlement of these rates respondent must supply the city with water; that this results from the public duty imposed upon it

when it accepted its charter from the State and its franchise from the city." By paragraph 2 of the agreed statement of facts it is agreed that this "judgment as alleged is in full force and unreversed." This judgment instead of establishing what is claimed for it that the obligation arose out of an agreement, emphatically declares that it grows out of the franchise and charter and is a public duty, a *quid pro quo* on that account. And yet under all these conditions and facts, without any consideration except the performance of a legal duty, we are asked to imply a contractual *obligation* by which the city surrenders its rights of a public character to bring in its own water works.

Besides all this, under Section 17 of the ordinance this language is used: "Provided always that said company shall not refuse * * * to sell or deliver water to any person who shall offer to pay for the same and shall comply with the provisions of this ordinance," thereby showing it to be a bare privilege and not an obligation, to purchase, as expressed in Section1.

And in Section 3 it provides, "Nothing contained herein shall preclude the City of Helena from the * * * construction or maintenance of sewer works, or *other works or plants of a public* nature, or from letting, giving or granting and franchises, rights or easements to any person or persons, corporation or corporations whatsoever, so long as such franchises, rights and easements do not interfere with the franchises, rights and easements

hereby granted." It then provides that the water company must look to the trespasser for any interference with its pipes, mains, etc. Thus showing that it refers to actual damage and not damages arising from competition in the sale of water. No one versed in the law would assume for a moment, under existing conditions that either the city or its inhabitants are liable for damages for a refusal or failure to purchase the water, which would be the result if there was any implied obligation to do so.

But above all, as will be seen, the franchises granted are defined in Section 1 to be the use of the streets, to utilize its plant, and sell water to the city and its inhabitants, if they *desire to purchase the same.*

Pursuing this subject further, Section 6, as heretofore suggested, is the only one that requires the appellant to furnish water to the *city* and *inhabitants* aside from Section 26. But it must be noted that aside from the *public duty* to furnish water during the existence of the franchise, the *agreement* to do so is only for five years, which has long since expired. So that, in so far as any *obligation* by agreement is concerned, enforceable under *this suit,* none now exists and none existed at the time of the commencement of it. The result is that since the contractual obligation expired the relative rights and duties are such as arise from the franchise pure and simple.

Section 6 reads:

"Sec. 6. The said Helena Consolidated Water Com-

pany shall furnish and provide a full ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction) and for other purposes; and such supply shall be full, ample and sufficient for the present population of the said city as the same may be from time to time during the full term of five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use."

Upon the trial it was claimed that Section 26 extended this contractual obligation beyond five years as *expressed* in Section 6. We do not so consider it. By Section 21 appropriations for the payment for the water were limited to the five years and no provision is made beyond it. Under Section 6 the city and inhabitants are upon the same plane and occupy identically the same position and status. The obligation under the *agreement* contained in it, if any, expires as to the city and also as to furnishing the inhabitants. We concede the continuance of the public duty to furnish the water, from thence on constitutes the exact relation of the parties, but deny any implied obligation to purchase, upon which this suit rests. Now Section 26 was adopted at the very time the *agreement* was made by Section 6, to furnish water for five years, and Section 26 reads:

"Sec. 26. It is hereby declared and understood to

be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed."

Now the only *agreement* to furnish water being contained in Sections 1 and 6, Section 26 manifestly refers to it and uses the phrase, "It is hereby declared and understood, to be of the essence of *the agreement* and acceptanie *hereof*," not thereof, that it will furnish water not only during the whole term of the franchise, which it was its *duty* to do, but "during the term of such agreement," and shall sell and distribute the same "upon the terms and conditions herein provided and *expressed*," not implied. The terms and conditions expressed are if the city and inhabitants desire to purchase. The general rule of construction requires that effect be given to each section, and the statute expressly says they shall be so interpreted. If there is a *contractual* obligation to furnish water for the full period of the franchise then Section 6 limiting it to five years is meaningless and has no effect whatever. Limiting Section 26 to just what it is intended, *i. e.*, to declare what is the essence of the *agreement* contained in Section 6, effect is given to all and the parties are left from then on without any contractual obligations, and

their rights are regulated by the public duty growing out of the franchise, and this is exactly what is decided in the action for a mandamus. There can be then no *implied contract* to furnish the water, upon which to base the few decisions following the theory that the city on account thereof had surrendered the public right to bring in its own plant. Perhaps few words in the English language have undergone so many judicial interpretations as the word "inhabitant." This has arisen on account of the various connections in which it is used. So that the ultimate result is, the connection in which it is used determines the meaning to be given it. The connection in which it is used in Section 26, of ordinance 248, would not include as it otherwise would, all persons, companies and corporations, because it refers to a quality of water, that does not necessarily include all. To that extent it may be regarded as a limitation, upon its meaning of the words persons, companies and corporations theretofore used to those desiring to use it for culinary, drinking or domestic purposes. Hence, while inhabitants in a general sense would be included in any person, company or corporation, it is limited as used in the particular suggested. Transactions by which competitive bidding is obstructed are usually regarded with great disfavor, as *tending* to create a monopoly. To avert this and afford full, free and complete competition, the constitution of Montana provides, "That the legislative assembly shall pass no law granting to any corporation, association or individual

* * * any special or exclusive privilege, immunity or franchise whatever." By excluding the city from a right to compete you deprive the inhabitants of the city to have it as a competitor. It is against public policy so long as the inhabitants are entitled to have it as a competitor to so contract as to deprive them of that right, *i. e.*, to operate as an estoppel against the city, as much as it would be for a merchant to agree to not sell goods in the city for a period of twenty years. If such power exists at all it is of such a nature as to require the obligation to be express. In the face of these provisions and the reservation in the ordinance it will certainly not be implied. Indeed, in the absence of all this, under a majority and the best reasoned decision holds that an absolute obligation to furnish does not imply an obligation to take. It is not a question of taking the right of competition away by a twenty year contract, but taking it away while the right exists. This adjudication, and the proper deductions from ordinance 248, brings this case on all fours with the Skaneateles case, and there we let it rest.

III.

Estoppel by Former Judgment.

The grounds upon which this plea of estoppel rests are set out in the agreed statement of facts, which for convenience sake we here produce.

Record, p. 48, VII, reads:

"It is also agreed that an election held at said city

on the 29th day of July, 1895, it was decided that the limit of the city's indebtedness might be extended under the constitution and laws passed in pursuance thereof by the legal voters of said city. That thereafter the city council of said city by resolution duly passed, directed the city clerk to advertise for bids for a supply of water to be furnished, owned and controlled by said city in accordance with plans and specifications theretofore adopted, and complied with the requirements of the law in such matters as hereinabove in paragraph IV stated. That on the 14th day of December, A. D. 1895, said The Helena Consolidated Water Company, predecessor in interest of complainant, commenced its action in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, by which it sought to enjoin the defendant from advertising and receiving bids for said purpose, and to which complaint, defendant, the City of Helena, duly filed its answer; that a restraining order was duly issued and an appeal therefrom duly taken to the Supreme Court of the State, and by that Court the said judgment so appealed from, was reversed and said cause remanded with directions to said trial court to dissolve said injunction and dismiss said complaint; that thereupon a mandate duly issued and said injunction was dissolved and said complaint dismissed and judgment entered accordingly, all of which said proceedings are still in full force and effect and unreversed, and a copy of the pleadings, order for

injunction, appeal, judgment and opinion of the Supreme Court are hereto attached and admitted with all the force and effect to which the same may be and are entitled."

It will be noted that appellee does not claim that the *same* question here involved was *actually* decided, but that it was *necessarily* decided for the reason that the *judgment* under the *issues* could not have been rendered without deciding it adversely to appellant. That is to say, it is *necessarily* so decided to maintain the judgment under the issues. This requires an examination of the pleadings and issues to ascertain what was necessarily decided and concluded by the judgment in the action. It will be noted in the outset that the action now under consideration is not like the one heretofore discussed, which was mandamus and based upon the duties of the water company under its charter and franchise, but an action in equity like the present suit upon what is claimed to be *contractual obligations*. The action was commenced like the present suit, by the predecessor in interest of appellant, in its dual capacity of taxpayer, and its rights under its certificate of incorporation and franchise under ordinance 248, and what is also known as the rider. The object of the action was, as is the present one, to enjoin the appellee from putting in its own water plant, which it is now seeking to do.

We call especial attention of the Court to the complaint in the former action, found on page 53 et seq., and the answer on page 126 et seq., of the record, containing

at large the issues presented for trial. For convenience, however, we give a synopsis of what is deemed to be the matters material to the determination of the estoppel.

The complaint alleges that plaintiff is a taxpayer and brings the action for himself as such and all others similarly situated; it claims, especially under ordinances 95 and 248, and makes them, as it does here, a part of the complaint; it alleges an acceptance of and compliance with them in every respect, and that it has been furnishing water to the city and inhabitants in pursuance of them for a long time and that it is still doing so; that it has a right and is entitled to furnish and supply the city and its inhabitants with water under said ordinance; that the city is taking steps to construct and maintain a water plant of is own, and then sets up what is known as the rider. Upon these claims and rights it asks that the city be enjoined, and prays for the same rlief that is sought in this suit. It asserts its rights, first, as a taxpayer; second, under ordinances 95 and 248; third, upon the rider requiring the city to purchase its plant before it can bring in one of its own. Upon these three titles it based its cause of action, the object of which was to prevent the city from constructing and maintaining a plant to supply itself and its inhabitants with water. The answer in many instances denies the allegations of the complaint, but as the case was determined upon the sufficiency of the complaint, *i. e.*, assuming the facts alleged to be true, that the plaintiff was not entitled to an injunction or any other

relief, the answer and replication are immaterial to the question of estoppel now presented. A cursory perusal of the complaint in the former case will show that the same issue is tendered ,the same rights asserted and the same object sought to be attained. The trial court granted an injunction, this appellee appealed therefrom to the Supreme Court of the State, and according to the agreed statement of facts, the following judgment was entered: "That the judgment and order appealed from are reversed and the cause remanded with directions to dissolve the injunction and dismiss plaintiff's complaint;" and that a remittur issued and final judgment was entered accordingly, which is still in full force and effect. Appellant claims as a successor in interest of the plaintiff in the action thus disposed of, under purchase at judicial sale, upon the foreclosure of a mortgage on the property and franchise of the plaintiff in the former action. Was the precise *question* now presented *necessarily* or *actually* decided in the former action, and if so, is appellant, as a purchaser under the foreclosure sale, estopped by the judgment?

As we have heretofore seen, the only new matter set up inthis suit concerning appellant's rights as a taxpayer relates to the Beaver Creek water, which had passed the reach of injunction. The other questions are absolutely identical and come squarely within the rule making the former judgment an estoppel, if appellant is a privy or bound by it. The validity of the rider was directly in

issue and *necessarily and actually* determined adversely to the predecessor in interest of appellant, and if it is bound by it as such successor, operates as an estoppel. The only room for contention refers to the right of appellant then and now asserted under ordinances 95 and 248, which it was claimed was neither *necessarily* or *actually* decided, and to that this discussion will be confined. Was the question here involved *necessarily* decided in the former action?

The rule seems to be that when the facts upon which a right or title is pleaded and upon which a recovery can be had, a dismissal of the bill *necessarily* determines that the plaintiff is not entitled to relief. In the former case the ordinances being set out in full in the complaint, and acceptance and compliance with all their terms being alleged, a complete and perfect contract and cause of action is alleged, if any exists. The inference as to the legal effect of these allegations is one of law, and had the pleader alleged that on account of such fact there was an obligation on the part of defendant to purchase the water, and for which reason it is estopped from putting in its plant, such averment would be stricken out as a conclusion of law under the code of Montana, and the pleading permitted to rest upon the allegations of fact showing the contract.

A distinction must of course me made in reaching the gravamen of the real issue, between cases where a party might have set out his title in full and had it litigated in

the action and did not do so, and, as in the former case, where the particular title, under the ordinances, is set out and might have been tried. In the former case some authorities hold that it should have been pleaded—*i. e.*, all the title the complaining party had to maintain his action, and if he did not do so he was bound by the judgment; while in the latter it is uniformly held that the judgment *necessarily* determines the right, and is *res judicata* whether actually tried or not. In other words, when the issue as to the particular title is tendered, it cannot be abandoned on the trial without relinquishing the claim, and suffering the consequences of the judgment under the pleadings.

The title of the complainant under the contractual obligations of the ordinance and its rights under the rider went to make up a cause of action for the injunction and the judgment imports a determination of the cause of action thus alleged. It must be conceded that if plaintiff was entitled to an injunction under *either* of the three titles pleaded the complaint should be sustained and the injunction granted. The converse of this proposition is equally true, if the complaint is dismissed upon the merits, it is a determination that a recovery cannot be had upon *either* of the titles pleaded. Either may be abandoned as untenable, and the court may pursue that theory, but the result of the adjudication had by the judgment under the pleadings cannot be avoided in that way. If it could,

by splitting up his claim, there might be no end to litigation.

To illustrate, counsel in their brief, which is a part of the records, suggests to the court, notwithstanding these allegations, "The only question presented for the determination of the court is as to the constitutionality of paragraph 64, Section 4800," thereby virtually conceding that the claim as a taxpayer and under ordinances 95 and 248 were of no consequence. The court of course followed this suggestion, but as we shall see this does not avoid the binding force of the judgment under the *title pleading*.

The court, in accordance with this suggestion, 20 Montana, page 1, ignores the right and title set up as a taxpayer under the ordinances and says: "But we agree with counsel for respondent that the only question presented for our determination is as to the constitutionality of the two provisos of subdivision 64 of Section 4800," *i. e.*, the rider.

And on page 12, in relation to this very question under the ordinance, in our judgment, notwithstanding it was regarded as immaterial by counsel, the court not only *necessarily* but *actually* decided it by using this language: "Under the contract or franchise under which plaintiff bases its right of action the *city reserved* the right to enter into contracts with and purchase water from any other person or corporation for city purposes." It thus decides that under the reservation we have heretofore dis-

cussed, which includes also the furnishing of water for the inhabitants, no contractual obligation was ever entered into by which it agreed to purchase the water unless it desired to do so, and upon which the right to the injunction in this suit depends.

Under the issues thus tendered by the pleadings it was conceded that, aside from the *rider*, the city could bring in its own water plant and maintain it. This was an abandonment of all other rights to prevent it from so doing under the pleadings, and left the only question for determination the constitutionality of the rider. Naturally enough, if the ordinance *propria vigore*, deprived defendant city of this right, the constiutionality of the ridar was utterly immaterial. To make it conrolling, the right under the ordinance to establish its own plant, and as a taxpayer, must be conceded. This was done and the court agreed upon this construction of the ordinance, which made it *res judicata*, and proceeded to determine the constitutionality of the rider as the *only* question left for its determination, *i. e.*, it assumed that the claim as a taxpayer, and the ordinance, *per se*, did not prevent the city from establishing the plant. It is now claimed that this right of complainant as a taxpayer and under the ordinance, would have sustained the injunction, and that these matters, thus conceded and abandoned, are still open for investigation and determination. Under such circumstances the court in limiting its consideration to the single matter of the validity of the rider, could not and did not

relieve complainant of the effect of the judgment as *res judicata* as to the matter conceded and abandoned and which, as now claimed, would have supported its cause of action.

It is to be presumed that the City of Helena was apprised of the fact that some courts had held that where there was an obligation imposed upon the water company to furnish it and the inhabitants water during the franchise, that there was an implied obligation that the city would take it, and by this precluded itself from bringing in its own water plant. It is to be presumed that the city knew that if it was *expressly* provided that the city would take the water only in the event it *desired* to take it, that it was tantamount to a reservation of a right to put in its own plant, and that in the face of that provision no court would enjoin it from exercising this reserved right. And it will be assumed that the chief justice had this in view when he said the city had reserved the right to "enter into contracts with and purchase water from any person or corporation for city purposes."

The franchise granted is the right to lay its mains and pipes in the public streets for the purpose of selling water to the *city* and inhabitants. To prevent operating as an implied obligation to purchase, thereby clouding the right in the meantime, it provides, "in case said city desires to purchase the same," and the right to sell all others "desiring to purchase the same." The decision of the court refers to the construction of the law, is local in its

application, decides the question involved and is a precedent, if not *res judicata*, to be followed by the Federal Courts. The language of the granting clause is: "There is hereby granted to the Helena Consolidated Water Company and its successors and assigns, for the full term of *twenty years* from the passage hereof, the *license* and *franchise* of laying and maintaining water mains and pipes in and through all the streets, alleys, avenues and public grounds of the City of Helena for the *purpose* of *conveying* and *distributing* water *through the said city* and for the purpose of selling the same to *all persons, bodies or corporations within the said city, desiring to purchase the same,*" with a like provision and *reservation* as to the purchasing by the city for "fire, sewerage and other purposes." It is not at all surprising that the City of Helena, under its advertisement for proposals, when ordinance 248 was presented, should insist that Section 26, referring to the character of the water and that it be made the essence of the agreement, should be added, and that in so far as purchasing the water for itself and by all others within its limits is concerned, there should be no obligation to purchase, but a right to do so if desired. These are prominent and controlling features of the ordinance, reconcilable with all its other provisions, and cannot be disregarded in the construction to be given it without great and serious injustice. The question or principle of construction has therefore actually been established and is a precedent if not an estoppel. But it is an estoppel

because *necessary* to be decided under the complaint to justify its dismissal.

In Aurora City vs. West, 7 Wallace, 82, the Supreme Court of the United States, on pages 95, 96 and 97, uses this language:

"Aside from all these questions, and independent of the form of the replications, the defendants make two objections to the theory, that the former judgments, set up in this case, are a conclusive answer to the respective defenses pleaded in their several special pleas.

First. They contend that a judgment on demurrer is not a bar to a subsequent action between the same parties for the same cause of action, unless the record of the former action shows that the demurrer extended to all the disputed facts involved in the second suit, nor unless the subsequent suit presents substantially the same questions as those determined in the former suit. Where the second suit presents no new question, they concede that the judgment in the former suit, though rendered on demurrer, may be a bar to the second suit, but they maintain that it can never be so regarded, unless all those conditions concur.

Secondly. They also deny that a former judgment is, in any case, conclusive of any matter or thing involved in a subsequent controversy, even between the same parties, for the same cause of action, except as to the precise point or points actually litigated and determined in the antecedent trial; and they insist that none of the defenses

set up in their several special pleas were directly presented and determined in either of the former suits, as supposed by the plaintiffs.

The identity of the parties in the former suits, with the parties in the suit at bar, is beyond question, and it cannot be successfully denied that the cause of action, in the former suits, was the same as that in the pending action, within the meaning of that requirement, as defined by decided cases of the highest authority.

Where the parties are the same the legal effect of the former judgment as a bar is not impaired, because the subject matter of the second suit is different, provided the second suit involves the *same title*, and depends upon the same question. Second suit for trespass was held, in case of Outram vs. Morewood (3 East., 346), to be barred by the record of a former judgment between the same parties, recovered long before the second trespass was committed, as it appears that the same *title* was involved in both cases. Precisely the same rule was also laid down in the case of Burt vs. Sternburgh (4 Cowen, 559), and the reason assigned in its support was, that the plaintiffs' right of recovery and the defense set up in the second action depended on the same *title* as that involved in the former suit. So, where an importer and two sureties executed two bonds for duties, and the principal being insolvent, one of the sureties paid the whole amount and brought suit against the other surety for contribution on the bond which first fell due, and was defeated, on a plea

of release, by the obligee, with his own consent, the judgment was held in a subsequent suit for contribution for the amount paid on the other bond, to be a conclusive bar to the second claim, it appearing that both bonds were given at the same time, upon the same consideration, and as parts of one and the same transaction.

Different bonds, it will be noticed, were described in the two declarations, but the decision of the court was placed upon the ground that the cases were precisely alike, as to the right of the plaintiff to demand, and the duty of the defendant as a co-surety, to make contribution.

Nothing is better settled, say the court, than that the judgment of a court of concurrent jurisdiction, directly upon the point made in the suit, is conclusive between the same parties, upon the same subject matter, and they referred to the case of Gardner vs. Buckbee (3 Cowen, 120), as directly in point, and there can be no doubt that it is entirely analogous.

Substance of the material facts in that case was that two notes had previously been given by the defendant for the purchase money of a vessel, which he refused to pay; and in the suit on the first note the defense was that it had been obtained by fraud, and the judgment was for the defendant; and in a subsequent suit on the other note, that judgment was held to be conclusive as to the question of fraud.

Weighed in the light of those decisions, it is quite

clear that the cause of action, in the legal sense, is the same in the case at bar as that in the respective former judgments set up in the four replications under consideration."

It is an attempt to prosecute this action upon the *same claim* and *demand* as that upon which the former action was based, that is on the obligations implied from the acceptance and compliance with ordinance 248. In Cromwell vs. County of Sac, 94 U. S., 352, the same court says:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

New Orleans vs. Citizens' Bank, 167 U. S., 371.

Southern Pacific &c., vs. U. S., 168 U. S., 1.

Brady vs. Daly, 175 U. S., 159.

Lumber Co. vs. Buchtel, 101 U. S., 638.

Case vs. Beauregard, 101 U. S., 688.

The judgment is conclusive of all the *issues raised* in the *pleadings* and the parties are precluded from litigating the same matter in a new suit.

Lord vs. Morris, 18 Cal., 482.

Caster vs. Brown, 23 Cal., 143.

Lents vs. Shear, 26 Cal., 361.

The former judgment established the status and relation of the parties concerned to the ordinance, and is *res judicata* as to them and any one succeeding to either of their interests. Section 3196, Code of Civil Procedure, reads:

"The effect of a judgment or final order in an action or special proceeding before a court or judge of this state or of the United States having jurisdiction to pronounce the judgment or order, is as follows:

"1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal political or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will or administration, or condition, or relation of the person."

The judgment is entitled to full faith and credit, and in Montana it is presumed to determine every fact well

pleaded, *when* rendered on the merits, which is necessary to uphold the judgment.

Kleinschmidt vs. Binzel, 14 Mont., 58.

But the statute is explicit as to what is *necessarily* adjudicated, and declares that under the record whatever is necessary to support the judgment is adjudged. This would seem to exclude anything the court might say as to issues actually tendered and the decision of which is necessary to support the judgment. It reads: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein, or *necessary thereto.*"

Not what was *actually* decided, but what was actually and necessarily included, or necessary to uphold the judgment. Hence under the former complaint based on the ordinance, acceptance and compliance with it, a right to injunction existed, which is the question here, and its determination was necessary to dissolve the injunction of the trial court and dismiss the bill, it is *res judicata* under the *Code.*

In Peterson vs. Weisbein, 80 Cal., 38 and 39, the court says:

"On a former appeal this cause was reversed on the ground that the defendants, who relied upon a constable's deed to establish their title, had not made out their case for the reason that they had failed to introduce in evi-

dence the judgment and execution *on which the deed was based* (Peterson vs. Weisbein, 75 Cal., 174.) On a second trial the evidence was supplied and judgment was again rendered for defendants.

The plaintiff objected to the introduction of the judgment and execution in evidence on the ground that the judgment was invalid. But it was shown by evidence that in an action between the plaintiff and the defendant's grantor, who was the purchaser at the constable's sale, it was determined by the judgment that the judgment of the justice's court and the sale under it *were valid.* This adjudication was conclusive as to the *validity* of the *judgment* (Peterson vs. Weisbein, supra). Therefore the court below did not err in it in evidence.

The judgment roll in the case between the plaintiff and the defendants' grantor was objected to on the ground that the parties in that action were not the same as in this. But the defendants having purchased from the party in the former action, the judgment inured to their benefit and was competent evidence."

And so it is, where the mortgage was taken and the purchase made under the foreclosure of it, appellants took the interest of their predecessor subject to legitimate legislation concerning the force an deffect to be given the judgment. That is to say, subject to the statute that everything necessary to support the judgment and included in the pleadings is adjudged by it. So that giving the judgment full faith and credit under the Montana

code requires that any decisions cited in conflict with it must yield to its provisions.

In Freeman on Judgments (4th Ed.), p. 460, this doctrine is stated: "So if a contract is construed, or if a party has been determined not to be entitled to its benefits, such construction or determination is conclusive in subsequent controversies," citing:

Buchanan vs. Smith, 75 Mo., 463.

Lorillard vs. Clyde, 122 N. Y., 41; 19 Am. St. Rep., 470.

Robinson vs. Fries, 22 Fla., 303.

Noys vs. Kern, 94 Ill., 521.

And on page 256 the same author says: "The principle underlying and supporting all these decisions is, that a judgment *necessarily* affirming or denying a fact is conclusive of its existence whenever it becomes a matter in issue between the same parties, or between parties in privity with them." * * * It is not necessary to the conclusiveness of the former judgment that the issue should have been taken on the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment. Every point which has been either *expressly* or by necessary implication in issue, which must *necessarily* support the judgment or decree must be concluded." It is manifest that this is the rule adopted by the code quoted, in-

stead of requiring the matter to have been actually decided, unless it be regarded in the sense that whatever is *necessary* to support the judgment is deemed *actually* decided.

And on page 259 the same author says:

"During the trial of a cause evidence may properly be received of the existence or non-existence of facts which, though they bear upon an issue and tend to show on which side of it the truth is, are not, though conceded to exist, necessarily conclusive. It is this class of facts which the courts have usually intended to designate by the terms 'collateral,' 'incidental,' or 'not directly in issue,' and therefore as not being proved or disproved by the judgment, though controverted at the trial, and perhaps passed upon by court or jury and exercising a controlling effect over the verdict and judgment. Still, if the judgment can be correct, whether the fact in question exists or not, it is not directly in issue, and therefore does not become *res judicata*.

In determining what has been decided, and what, therefore, became a binding adjudication, the actual judgment of the court must be consulted, and so far as it speaks, must be allowed to control. Its clear import cannot be modified or controlled by the expressed opinions of the judge by whom it was pronounced, nor by the reasons urged by them in its support. In ascertaining whether a particular matter has become *res judicata*, the reasoning of the court is less to be regarded than the

judgment itself, and the premises which its existence necessarily affirms.

Henry vs. Davis, 13 W. Va., 230.

Hymes vs. Estey, 116 N. Y., 501; 15 Am. St. Rep., 421.

McKinney vs. Curtis, 60 Mich., 611.

Kid vs. Laird, 15 Cal., 161; 76 Am. Dec., 472.

Smith vs. Sherwood, 4 Conn., 276; 10 Am. Dec., 143.

Cavanaugh vs. Buehler, 120 Pa. St., 441.

Stannard vs. Hubbell, 123 N. Y., 520.

Lorance vs. Platt, 67 Miss., 183.

Hubbard vs. Flynt, 58 Miss., 266.

Houser vs. Ruffner, 18 W. Va., 244.

Gilbert vs. Thompson, 9 Cush., 348.

Doonan vs. Glynn, 28 W. Va., 715.

Beckwith vs. Thompson, 18 W. Va., 103.

Wood vs. Jackson, 8 Wend., 9; 22 Am. Dec., 603.

Lentz vs. Wallace, 17 Pa. St., 412; 55 Am. Dec., 569.

McDonough's Succession, 24 La. Ann., 34.

Plicque vs. Perret, 19 La., 318.

Hill vs. Bowman, 14 La., 445.

Buckner vs. Calcote, 6 Cushman, 432."

Herman on Estoppel and Res Judicata, in accord with this rule, declared by the Statute, Vol. 1, page 270, says:

"First: The maxim: *'Interest republicae ut sit finis litium,'* has never yet been questioned; and Second: Whenever a matter is adjudicated, such judgment decides every matter which pertains to that cause of action or the defense set up, or which is *involved in the measure of relief to which the cause of action or defense entitles the party,* even though such matter may not be set forth in the pleadings, so as to admit proof and call for an actual decision upon it. This principle prevails throughout the civilized world, with but few exceptions, and includes not only what actually was determined, but also extends to every other matter which *under the issues* the parties *might* have litigated in the case."

And on pages 274 and 280 the same author says:

"In a judicial proceeding in a court of record, where a party is called upon to make good his cause of action or establish his defense, he must do so by all the proper means within his control, and if he fails in that respect, *purposely* or *negligently,* he will not afterwards be permitted to deny the correctness of the determination nor to relitigate the same matters between the same parties. If a party having a defense which he might make, omits to do so, he waives it. If a party fails to plead a fact he

might have pleaded, or makes a mistake in the progress of an action, or fails to prove a fact he might have proven, the law can afford him no relief. When a party passes by his opportunity, the law will not aid him."

"An estoppel created by a judgment is not limited to facts admitted or proved. Judgments turning exclusively upon questions of law are equally conclusive. It is the judgment itself, whatever may be its form, and without any regard to the nature of the question in controversy, that creates the estoppel, and when the same question is at issue between the parties in two successive actions, a judgment rendered for the defendant in the first is an absolute bar to a recovery in the second, although the evidence in the second, had it been given in the first, would have entitled the plaintiff to recover, and although the subject matter of the subsequent suit is different from the first, where it depends upon the *same question*, it is equally conclusive."

It was claimed that the bill in this suit was multifarious, because two causes of action were united, *i. e.*, one as a taxpayer and the other under its title as on account of the ordinance and rider. This was overruled. The same conditions exist under the averments of the complaint in the former action. But it has never been insisted and could not be, with any degree of propriety, that the assertion of a title under the ordinance and rider constituted in the former or in this suit two *causes* of action. They are simply muniments of title in establishing the cause

of action, *i. e.*, the unlawful attempt of the city to put in a plant of its own, and to authorize the injunction, the sole object of both actions.

The authorities seem to uniformly hold that if the facts alleged constitute but one cause of action, it cannot be split up and part tried at one time and the balance at another time, as is the case here. The plaintiff might have announced, as it did announce, that it had another title and right besides the rider that entitled it to the injunction, but did not propose to try it now, and will bring on another action, comprising the same cause and seeking the same relief. It may take such course and influence the action of the court, but it cannot thereby escape the binding force of the judgment under the judgment roll. Especially would this be true as in both the former action and in this suit, these two elements of title are set up, either or both of which may or may not support the cause and object of the action.

But why rely solely upon the decision, when the statute, the law upon every subject upon which it legislates, emphatically declares the effect of the judgment and the mode of escaping it. If the dismissal is on the merits it is *res judicata* between the parties and privies as to all the issues tendered under the judgment roll. Section 1004, Code of Civil Procedure, reads:

"An action may be dismissed or a judgment or nonsuit entered in the following cases:

1. By the plaintiff himself, at any time before trial,

upon payment of costs; provided a counter claim has not been made or affirmative relief sought by the answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon.

2. By either party upon the written consent of the other.

3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

4. By the court when upon the trial and before the submission of the case the plaintiff abandons it.

5. By the court, upon motion of the defendant when upon the trial the plaintiff fails to prove a sufficient case for the jury.

6. By the court when after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months.

7. No action heretofore or hereafter commenced shall be further prosecuted, and no further proceeding shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year and served and return made within three years after the commencement of said action, or unless appearance has been made by

the defendant, or defendants, therein within said three years.

The dismissal mentioned in the first two subdivisions is made by entry in the clerk's register."

Section 1005 reads: "In every case, other than those mentioned in the last section, judgment must be rendered on the merits."

Section 1007 reads: "A final judgment, dismissing the complaint, either before or after a trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon its merits."

Under these statutes, the judgment is emphatically one upon the *merits* and is conclusive between the parties and those in privity with them whatever may have been or be, the rule in the absence of them. It appears from the judgment roll that it was not rendered under Section 1001; that it was another case than those mentioned therein, and emphatically under Section 1007 prevents the maintenance of another action. The result of all this is, that under the statute, which must control, the former judgment is conclusive between the parties and those in privity with them. It assumes that every fact and comment of title placed, is conceded and yet no cause of action exists. It has the force and effect of a judgment upon demurrer, does not come under any of the grounds enumerated in Section 1004 and must consequently be a judgment upon the merits, under the mode presented for

ascertaining that fact, emphatically declared and presented by the statute. There does not seem to be room for doubt but that appellant is a privy to the former judgment and consequently bound by it.

The facts disclosed by the record show that the ordinance was in force and unchanged, at the time the mortgage referred to was executed, and that to the extent of the interest acquired in the franchise or license under ordinance 248, the mortgage was a privy as successor to one of the parties to the contract. This privity once attaching adheres to the transaction, and follows the title of each successor. The purchase under the mortgage was made, not pending the former suit, but after the judgment in it. So that under it appellant was likewise not only a privy but a purchaser at a judicial sale who steps into the shoes of the judgment debtor mortgagor and judgment creditor and privy mortgagee. Hence, all involved are privies and the rule as to the binding force of the judgment under the statute, to give it full faith and credit obtains. The case is consequently unlike one when a third party not a privy enters the field of litigation. In such case all the parties who are privies as between themselves, are entitled to be heard and a hearing as to one, would not of course be an estoppel as to the other. To illustrate: Under the laws of this State one receiving personal injuries by the negligence of a railroad, is entitled to precedence under any judgment he may recover as against a prior mortgagee. If an action is brought and

judgment recovered under such circumstances, both the railroad and *perhaps* the mortgagee are entitled to be heard and a recovery against one would not be an estoppel as to the other.

But on the other hand suppose the contention was one between the grantee of the franchise and the grantor, involving the naked legal question as to the status, *i. e.*, legal relation of the parties. In such case all the parties and privies are before the court, *i. e.*, the grantor of the franchise, the grantee and the mortgagee because he is a privy in estate to the grantee in the franchise. There is no third party involved and only the parties to the franchise and privies are to be found by the judgment. Hence, in the case we have used for illustration, it could only be analogous to the one in hand if the question there involved as it does here, a construction of the franchise, to the result of which the mortgagee had subjected himself as a privy, after the franchise was in esse. There are many reasons why this should be so, as it involves purely a legal question, leaving no room for collusion, fraud or injustice.

IV.

OBJECTION TO DECREE, AND REQUEST TO MODIFY.

It will be observed from the record, page 130, that the City of Helena objected to the decree and also requested a modification of the same upon the grounds that

it was too broad in its scope even though appellant was entitled to the relief asked for under Ordinance 248.

It also will be observed that the decretal order runs solely against the city bringing in water to supply its inhabitants and that the city is permitted to construct a plant for sewerage, fire and other municipal purposes.

It also appears from the record that the City of Helena is now proceeding to construct a plant for the purposes of supplying it with water for municipal purposes and for the inhabitants of the city.

It would seem to follow that in the exercise of ordinary judgment that it would be the policy of the city to construct its plant with sufficient capacity to furnish and supply the city for municipal purposes and its inhabitants, as a business proposition.

It would further seem that all that could be asked under such circumstances would be an injunction restraining the city from entering into competition with appellant in the sale and distribution of water to the inhabitants, and that the decree should be limited to that particular matter. That is to say: That if the city deemed it feasible and proper, in the exercise of its discretion and business functions, to bring in a sufficient quantity of water, with a view to supplying itself for municipal purposes, and also the inhabitants of the city, it should not be enjoined from doing so, and that the injunction should be limited as requested, to the sale and distribution of water to the inhabitants.

The trial judge announced, in ruling upon this matter, that he was inclined to follow the Joplin case, reported in 113 Fed., 817. But it will be noted that no such conditions existed as to require of the court a consideration of the questions presented by the bill of exceptions mentioned. There the franchise extended for twenty years, and there was no occasion for the city to put in its plant at that time, as there is here.

And it will be also noted that the Court in the Joplin case, on page 823, uses this language: "It must be kept in mind that what is complained of is that the city is about going into the business of furnishing commercial lights inside of the city limits." The effect of doing that is the question and only question in this case.

So we respectfully submit that if the court shall be of the opinion that the public right of the city to bring in a plant of its own to supply itself and its inhabitants with water has been ceded away, this decree, nevertheless, should be so modified as to permit it to construct and operate its plant, except in so far as furnishing and supplying the inhabitants of the city is concerned. See also upon the questions generally involved, 20 Enc. Law, 2nd Ed., 866, citing many cases.

Thomas vs. City of Grand Junction, 56 Pac., 665.

Hughes vs. Borough of Parnassus, 23 Pa., 196.

V.

PLEA TO JURISDICTION.

Prior to the date (April 12th, 1901) upon which appellant filed its bill of complaint herein for an injunction, the City of Helena, appellee, had commenced a condemnation suit in the District Court of Lewis and Clarke County, State of Montana, for the purpose of acquiring, by proceedings in eminent domain, the right to the use of three hundred and fifty (350) inches of the waters of McClellan Creek, for the purpose of supplying the City of Helena and its inhabitants with water. At the time of filing its bill of complaint in the suit at bar ,appellant averred in its bill of complaint (Paragraph 20, Tr., 10, and admitted in the Agreed Statement of Facts, Tr., 83), that said condemnation suit was then "pending and undetermined." To this the appellee city interposed its plea to the jurisdiction (Tr., 49), averring that on the ..th day of October, 1900, said condemnation suit above described had been commenced, and further set forth that a second condemnation suit had been commenced on the . . . day of February, 1901, in the District Court of the Fifth Judicial District of the State of Montana, in and for Jefferson County, each of which said actions was then pending and undetermined (Tr., 50).

Said plea to the jurisdiction also averred that another suit had, prior to the filing of the bill herein, been commenced in the District Court of the First Judicial

District of the State of Montana, in and for Lewis and Clarke County, by said Helena Water Works Company, complainant below and appellant herein, against said City of Helena, for the purpose of obtaining a temporary injunction enjoining and restraining said City of Helena from allowing or ordering paid any claims or demands for material furnished or services rendered said city during the time that it had been or will be indebted in excess of three (3) per cent of the value of the taxable property as ascertained by the last assessment for state and county taxes, except the claims and demands of said Helena Water Works Company for water furnished said city (Tr., 51-52).

Said plea to the jurisdiction also averred that on or about the .... day of March, 1900, Harry B. Palmer commenced an action in said District Court of Lewis and Clarke County, against the City of Helena, for the purpose of enjoining said city from auditing, allowing, or ordering paid any claim or demand against said city on account of any indebtedness incurred at any time when the indebtedness of said city exceeded three (3) per cent, its constitutional limit (Tr., 52); the plea further averring that said action was then pending and undetermined.

The plea was overruled in toto by the court (Tr., 82), and is herein assigned as error (Tr., 252).

The *gravamen* of the suit at bar is to restrain "the city from acquiring a water supply and system, unless it acquire that of appellant," and thus prevent the city

from further proceedings at law in the condemnation cases earlier instituted and in progress in the state courts.

The injunction as issued, restraining as it does the further prosecution of said condemnation cases in the state courts commenced prior to the suit at bar and over which said state courts had already theretofore acquired jurisdiction, is in direct violation of the plain terms of the United States statute in reference thereto, viz: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

U. S. Rev. Statutes, Sec. 720, page 137, 2nd Ed., 1878, and notations thereto.

Dial vs. Reynolds, 96 U. S., 340, L. Ed., 644.

Rose's Notes to U. S. Reports, Vol. 9, page 438.

Diggs vs. Walcott, 4 Cranch, 179.

Peck vs. Jenness, 7 How., 612.

Watson vs. Jones, 13 Wall., 679.

Haines vs. Carpenter, 91 U. S., 254.

Ex parte Chetwood, 165 U. S., 443.

Dillon vs. Kansas City Ry. Co., 43 Fed., 109.

The last cited case, *Dillon vs. Kansas City S. B. Ry.*

C., 43 Fed. R., 109, is directly in point. An injunction was sought in the Federal Court to restrain an entry upon the land sought to be condemned in a State Court, but was refused under the provisions of Section 720, U. S. Rev. St.

From the opinion in Mills vs. Provident Life & Trust Co., 100 Fed., 344 (Circuit Court App., 9th Circuit), we quote the following:

"It is apparent, we think, that the action was one for injunctive relief, not as an incident to an existing cause in equity, but as the primary object of the action." (The complainant in this suit like the complainant and appellant here was not a party to the action in the state court.) In answer to this position the Court, after approving of the liberal construction given to said Section 720 by the Court of Appeals of the Sixth Circuit, goes on to say:

"There is nothing in the language of Section 720 of the Revised Statutes, nor in the reason for that enactment limiting its provisions to parties and privies to the proceedings in the state court but the prohibition is *general* and denies to every federal court the right to stay by injunction, at the suit of *any person*, proceedings in any court of a state, with an exception within which the present case does not come. We are of opinion that the court below was without jurisdiction."

See also—

Sharon vs. Terry, 36 Fed., 365.

Eureka & K. R. R. Co. vs. California & N. Ry. Co., 103 Fed., 897 (9th Circuit).

Coeur d'Alene Ry. & Nav. Co. vs. Spalding, 93 Fed., 280 (9th Circuit).

Aultman & Taylor Co. vs. Brumfield, 102 Fed., 7.

VI.

THE BILL IS MULTIFARIOUS.

There is combined in the bill of complaint in this case two distinct and separate causes of suit, either of which entitles the complainant, according to its theory, to the relief demanded. While there are many cases decided in which different causes of multifariousness exist, the authorities seem to concur, that defendant cannot be called upon to defend two separate and distinct causes of suit where the same results could be attained by one. The true and correct test as to multifariousness in *this particular* is, whether two separate causes of suit are united in one bill of complaint, and is not in *such case* limited to the fact that each cause may entitle the complainant to the same relief. One *cause of suit* is based upon the rider and alleged contract which is sought to be specifically enforced by injunction, and the *other* is based upon the rights of a taxpayer, growing out of a *tortious*

diversion of the revenues of the city. It is impossible under legal or equitable jurisprudence to conceive of the union of these two, without violating the rule at law concerning the misjoinder of actions ,and the practice in equity in respect to multifariousness. In the former cause of suit, only evidence of the contract and rider are admissible, while in the latter, the rights as a taxpayer and wrongful diversion of the revenue is only admissible. Hence it is, the bill contains two separate causes of suit, requiring entirely different evidence to support them, one based upon contract, and the other sounding in tort. All well considered cases forbid this, and declare the bill in such case to be multifarious. Defendant should not be required to show cause until an election is had by complainant, at least, as to which cause of suit it will adopt. Besides, complainant suing for relief as a taxpayer, sues in that capacity for all others similarly situated, who are alike affected by the injunction and have no interest in the ordinance contract.

Church et al. vs. Citizens &c., 78 Fed., 526, 529.

Brown vs. Guaranty Trust &c., 128 U. S., 403, 412.

First Nat'l Bank vs. Peavey, 75 Fed., 154.
Leslie vs. Leslie, 84 Fed., 70.

Reynolds vs. Reynolds, 71 Cal., 183; 9 Pac., 179.

Hollow vs. Wallace, 66 Fed., 318.

Bliss, Code Pleading (2nd Ed.), Sec. 289.

15 A. & E. Encyc. of L., 947.

14 Encyc. of P. & E., 197.

Respectfully submitted,

E. C. DAY, City Attorney,

R. LEE WORD,

TOOLE & BACH, and

EDWARD HORSKY,

Solicitors and of Counsel for Appellee.

FILED
OCT 29 1904
JAMES H. McKENNEY,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 27.

THE HELENA WATER WORKS CO., APPELLANT,

vs.

THE CITY OF HELENA.

SUPPLEMENTAL BRIEF OF APPELLEE.

E. C. DAY,
City Attorney,
R. LEE WORD,
EDWARD HORSKY,
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Of Counsel for Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 13501

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SUPPLEMENTAL BRIEF OF APPELLEE.

Commencing on page 47 of appellant's brief, it is contended that under subdivision 64 of section 4800 of the Political Code of Montana, as amended in 1897, the city is precluded from acquiring a water plant and supply other than of appellant. Said subdivision is set forth at length on page 5 of appellant's brief, the particular proviso upon which the appellant relies commencing at the bottom of page 5 and ending on page 26.

But this proviso is practically and almost identically a re-enactment of said subdivision 64 of section 4800 of the Montana Codes of 1895, and which was declared unconstitutional by the supreme court of Montana in the case of Helena Consolidated Water Company *vs.* Steele, 20 Mont., 1.

The opinion in that case is made a part of the agreed statement of facts (paragraph 7, Record, 48) and is set forth

in full, commencing on page 117 of the record, while the pleadings, etc. (also by paragraph 7 of the agreed statement made a part thereof), are found on pages 52 to 77 and 117 to 128 of the record.

Having already discussed this case at length as being *res adjudicata*, we deem it unnecessary to pursue the particular feature, suggested in appellant's brief, further than to barely call the attention of the court to the facts mentioned, which speak for themselves.

It must be conceded that every contract when reduced to writing will be interpreted by the language used, unless at least it would lead to unreasonable and unjust results. For the purpose, then, of arriving at a correct interpretation of ordinance 248, upon the theory asserted by appellant, we shall assume that it is in the nature of a contract throughout, and eliminate from it entirely all of the attributes that would otherwise attach on account of the franchise granted and the corresponding duties arising from it. It must be noted, however, that we by no means concede as matter of law that under the rule applicable to such franchises, when under the constitution and express terms of the franchise no exclusive rights are granted to maintain water works or plant, any implied obligation is raised by which the granting power obligates itself to purchase water and thereby becomes estopped from establishing its own works or plant during the existence of the franchise. No lawyer can doubt for a moment that an ordinance, or contract as it is termed, cannot not be so framed and drawn as to obligate the grantee in the franchise, in consideration of the privilege granted, to furnish and supply the grantor with water for a particular period and at a specified rate, and at the same time reserve

to the grantor the right to purchase water or not, or procure it in any other lawful manner. We shall, therefore, assuming the right to contract in this manner to be a legal one, and that the grant of the rights and privileges is a good consideration for the obligation stated, endeavor to show to the court that this is exactly what has been accomplished by ordinance 248; and we shall assume, also, for the purposes of this argument, that the authorities cited by appellant in its original brief, tending to show that where there is an obligation imposed by ordinance or contract to furnish water, there is a corresponding obligation to purchase it, and that the grantee of the franchise is estopped from putting in a competing plant of its own—that is to say, by section 1 the grant was for twenty years. That by section 6 there is no limitation as to the duties and liabilities; that other sections provide for connections with the pipes to be made, that maximum rates are to be established, and that all these under section 26 are to exist for the full period of the franchise. We would then *perhaps* have a case, under some of the authorities cited, where the implied obligation relied upon would obtain. But suppose there is an express provision in the ordinance or contract that in addition to the provision in the franchise it shall not be exclusive, there is also a provision that no obligation whatever is imposed upon the grantee to take or pay for the water contracted to be furnished and supplied by the grantee of the franchise, will it be claimed that an implied obligation arises in the face of it to purchase the water, and, if not, that it is of any concern to the grantee from whence or how the grantor obtains its supply so long as it does not interfere with the franchise granted? We shall assume, as suggested

by counsel in their supplemental brief, that the transaction came up as it did, by a proposition from the grantee of the franchise to furnish and supply the city and its inhabitants with water for a period of twenty years; that it would put in suitable works for the purpose; allow all suitable connections with them, and furnish and supply good and wholesome water during the whole period of the franchise at a fixed rate. If the proposition was accepted according to appellee's theory, there is an implied obligation on the part of the grantor of the franchise to take and purchase the water during the twenty years, and that on account of such *status* it is estopped from establishing its own plant. Conceding this barely for the purposes of the argument, what is to be said if the city does not accept it and insists upon inserting a clause to the effect that it will not obligate itself or the inhabitants to take or pay for its water unless they desire to do so? Is not the whole proposition as to that matter thereby converted into an option? Will an absolute obligation be inferred in the very face of this provision? Will the court utterly ignore the express contract of the parties and substitute one directly adverse to it? The statute of the State of Montana, for the construction of this ordinance or contract, section 3134, reads: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted; and when there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Now it will, of course, be observed that this provision refers especially to the obligation of the grantee, makes it optional, that no others conflict with it,

but refer to the obligation or duty of the grantee in the franchise.

In all reason the express provision must be given full force and effect, and no inference must be had that will impair or defeat it. The rule is too familiar and well established to be questioned that no implication will arise which is in conflict with an express provision both reasonable and just in their terms. Besides, it is axiomatic that where rights are declared or reserved everything that is necessary and incident to their enjoyment is implied and inferred. The necessity for a supply of water cannot be denied; that appellee has the only source of supply is conceded. No exclusive rights are granted. The inference, therefore, clearly is that appellant can bring in a supply of its own, in the exercise of the right reserved, and appellee has no cause of complaint. To say that appellant reserved the right not to take or pay for the water, and yet it is to be inferred that it would take it or perish, is absurd and contradictory. The only reasonable inference under the reservations is that it would obtain a supply in any lawful way. It must be borne in mind that this express provision concerning the application of the city to take the water, in connection with the other express provisions that the right to furnish and supply the water is not exclusive, is peculiar to ordinance 248, rendering all of the decisions cited, according to our view, inapplicable upon that point.

Assuming, then, that the city has the right to contract for a supply of water, not only for municipal purposes but also for its inhabitants, the following will perhaps more fully amplify our views upon this subject:

Suppose that A is the owner of a large farm, and has a large

number of employees for whom he has a right to contract for provisions for their support. He leases a portion of the farm to B for the purpose of raising grain upon it, reserving all the unleased portion to himself, as the city here does concerning the streets, nothing being said in either case that the lessee does not intend to cultivate or utilize the unleased portions himself or confine himself to leasing the same to others. The terms of the lease are that he will allow B to occupy the land leased and cultivate and raise grain thereon for the term of twenty years, upon the condition that B will raise a good and wholesome quality, suitable for the consumption of the lessor and his employees, and that he will sell it to him and to his employees during such period at a fixed or given rate, provided A and his employees *desire* to purchase the same. Could it be claimed that under this condition A could not raise his own crop of grain and furnish his own employees? Yet the affirmative of this is precisely the condition claimed and insisted upon by appellant.

As we have heretofore shown by the original brief in this case, under the constitution and laws of the State of Montana, no exclusive privilege could be granted to appellant. Under its laws the city of Helena was empowered to bring in its own water plant to supply the city for municipal purposes and the inhabitants thereof with water, and the right of eminent domain was expressly conferred for that purpose.

Whether its right could be ceded away by contract at all, much less by implication, might present a very serious question, but to assume that when the very face of such contract—when its terms expressly declare that no exclusive privilege is granted, and any and all obligation to take or purchase water from appellant is expressly guarded against,

that such right is ceded away by implication presents a monstrous proposition under an irrational rule of construction.

It is manifest that the contrary was intended and that the city has retained and preserved, and intended to retain and preserve, the rights conferred, and that it should be permitted to exercise them, which it is now seeking to do.

Whatever may have been the result of the interpretation of franchises of other cities, there is no room under ordinance 248 to infer that the city of Helena has in any manner obligated itself to take water of appellee for any purpose, and consequently has the right to procure it in any lawful way.

Construed under the Statute.

We now especially invite the consideration of the court to the construction of the ordinance or contract under the rule declared and established under the statutes of the State of Montana. While we are irresistibly forced to the conclusion heretofore expressed, the method of reaching it is more direct and immediate. Preliminary to the analysis we propose to make, we will again restate the premise upon which it will be predicated. There are four provisions of the ordinance or contract which are alone material or pertinent to the determination of the main and controlling question under this branch of the case. If we are correct in the position that, under the terms of the ordinance or contract, the city has not obligated itself not to install its own water works or plant during the twenty years' franchise, it logically and necessarily follows that appellant has no cause of com-

plaint, and the decision of the circuit court of appeals should be sustained.

It is quite apparent that, when ordinance 248 was adopted, the four prominent and material matters bearing upon the question in hand were as follows:

First. That no exclusive privilege to establish and maintain the water works or plant or the right to furnish and supply the city and its inhabitants with water should be granted.

Second. That no obligation of any kind should be imposed upon the city to take water from said works or plant, but it should be entirely at its option to do so.

Third. That nothing therein contained should "preclude the city from constructing or maintaining sewer works or other works or plants of a public nature," or from granting such right to any person or corporation whatsoever.

Fourth. That the water to be furnished under the option to take in consideration of the franchise granted must be of a pure and wholesome character.

These are the only provisions of the ordinance or contract that are at all applicable to the question in hand, and are contained in sections 1, 3, 6, and 26, and we believe we have stated the substance of them correctly.

It might also be added that in connection with the provisions of section 3, authorizing the construction of works and plants of a public nature, section 5 provides, "nor shall such pipes or mains interfere or obstruct any sewer now in

said street, nor shall there be any interference with *mains, pipes,* or *sewers* which may be hereafter authorized to be laid or constructed, by or under the authority of said city of Helena, * * *." Thereby showing that such water works or plant was contemplated by the parties.

In the outset it must be observed that the language or phrase used and *inserted* in section 3 is that nothing herein contained shall preclude the city from constructing or maintaining " works or plants of a public nature." It is not even limited to public works or plants, but extends to all works or plants of a public nature. To cite the court to decisions or precedents that a city's street car plant, its light and power works and plant, its sewer works and plant, and water works and plant are not all included in the words or phrase, " works or plants of a public nature," would be vain and idle, if not indeed offensive to the rules of propriety. Hence it must be conceded that by an express provision of the ordinance or contract the right to construct and maintain water works and plants is expressly preserved.

Now, as we have seen by the section of the statute heretofore quoted, the court cannot omit that which is inserted or insert that which is omitted. So that the reservation of the right to construct and maintain its own water works or plant cannot be eliminated.

Section 2202, Code of Civil Procedure, declares: " For the purpose of ascertaining the intention of the parties to a contract, *if otherwise doubtful*, the rules given in this chapter are to be applied." Section 2203 reads: ' The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." 2206. " The whole of a contract must be taken together so

as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." We know that the works or plants of a city of a public nature include its water works or plant, and section 2209 reads: "The words of a contract are to be understood in their ordinary and popular sense * * *." The astute American has learned from his infancy that the public works and plants of a city include its water supply, and that when the works and plants of a city of a public nature are referred to, that its water system and supply are intended and designated. Sec. 2217 says: "Repugnancy in a contract must be reconciled, if possible * * *." Where is there any repugnancy here? There certainly is no express provision repugnant to this reservation, and the best-considered authorities show that there is no implied obligation not to construct and maintain its own water works, even in the absence of premises 1, 2, 3, and 4, heretofore stated. What, then, shall be said under the particular ordinance or contract when it expressly provides that the company's right to lay its pipes and furnish water to the city, for itself and its inhabitants, shall not be exclusive; that the city shall not be obligated to take its water unless it desires, thereby creating a bare option, and that it shall not be precluded from constructing and maintaining any works of a public nature? With the two former premises the latter would be implied, but the parties have seen proper to express it. There is no possible way of avoiding the results reached unless we create a repugnancy by implication, and then allow it to overcome and defeat the express provision, which cannot be tolerated under any rule of construction.

Are we to assume that the words there used are wholly

inconsistent with the main intention of the parties when they do not lead to absurdities, but are in accord with just and reasonable objects and purposes? It is not in consonance with a sound and good judgment that a city in dealing with public rights, to be maintained by the exercise of eminent domain, which can attach alone to such rights, should retain the privilege of putting in its own water works and plant, in consideration of granting a twenty years' use of the streets and *privilege* of selling water to the city or its inhabitants? There is neither reason nor justice in interpolating into this ordinance or contract an implied obligation not to construct and maintain its own works and plant at any time it may deem it expedient to do so during the twenty years' franchise.

By inserting the provision that no exclusive right to the use of the streets or to furnish the city or its inhabitants with water it rebutted any such implication. By inserting the express provision that it should not be required to take water for such purpose it absolved itself from all obligation to refrain from obtaining water in any lawful manner, and repelled any such implication, and by *expressly* providing that nothing therein contained should preclude the city from constructing and maintaining its own works and plants of a public nature it excluded the possibility of such implication. The claim of the company and upon which it must recover, that such implied obligation exists, is fairly negatived by those provisions of the ordinance or contract. It is by its option and reservations absolved from any and all obligations, legal, moral, or equitable, not to exercise the right to install its own water plant which is conferred upon it by law. The claim of appellant is imagination and not

founded in law or reason, if effect is to be given to the express provisions of the ordinance and contract and the provisions of the statute for the construction of it. The reserved right not to take the water unless it desired to, being in express terms, was in the minds of the contracting parties, and carried with it all the incidents necessary for its enjoyment, paramount among which is the right to install its own works and plant. The argument is that if no exclusive privilege is granted and *no* obligation to take the water is incurred, and these things were in the minds of the parties at the time, it fortifies the conclusion that the intention was to do just what is provided for—*i. e.*, permit the city to construct and maintain its own water works or plant. Indeed, this would be the result without the latter provision. The emphatic conclusion of all this is that it is no business of the appellant how the city of Helena obtains its water supply so that it is done in a lawful and legitimate manner.

The right to construct and maintain water works and plants by a city to supply itself and its inhabitants with water is a public right and public use expressly conferred upon incorporated cities of the State of Montana, and the right to the exercise of eminent domain is given for that purpose. It is a legitimate exercise of legislative authority in declaring what is a public use. When this power to construct and maintain water works and plants of its own is conferred upon a city, and it is claimed that these rights are surrendered or ceded away, assuming that it could be done at all, the language employed to effect that object should admit of no other rational construction. Here no such language is used, and no such necessary and unavoidable intendment obtains. On the contrary, the inference is that

under ordinance 248 this right was intended to be and has been retained and preserved under the canon of interpretation in such cases.

The high estimate we entertain for counsel asserting that water works or plants of this character are not of a public nature precludes the questioning of their sincerity, yet we nevertheless insist that they are laboring under a great and flagrant error.

And it must be borne in mind that the exercising of this very right to construct and maintain such works is expressly reserved. While we insist that the contractual obligation under a proper construction of ordinance 248 is limited to five years, yet it is manifest from what has been said that it is not material and does not change the legitimate conclusions arrived at by assuming the company's construction to be correct, of extending it to the full period of 20 years, as claimed by it. The conclusion of the appellee is that the power being conferred upon the city to construct and maintain its own works and plants, it is done in the interest of the public, and that in any contract or transaction it will not be presumed to have surrendered it, if it could do so, unless it expressly or by necessary and unavoidable implication has done so; that the intention to bind after councils for so long a period must admit of no doubt, if it can be done at all.

The appellant suggests that it was an easy matter to have expressly reserved this right. When the clause was inserted in the ordinance expressly providing that appellant should not be precluded from constructing and maintaining works and plants of a public nature, this was the time for appel-

lant to have made the suggestion it now makes, if it did not understand what was meant by the language used.

The doctrine seems to be universal that the supplying of water to the inhabitants of a city or town is, as we have seen, clearly a public purpose, to accomplish which the legislature may confer upon a city * * * the right to condemn private property, as will appear by reference to 29 A. & E. Encyc. of Law, p. 4, and authorities cited under note 4, and Rogers *vs.* Burlington, 3 Wall., 654. City water works and plants has a well-known meaning, and, under the law of which all must take notice, is of a public nature. The right to construct and maintain works and plants of a public nature comprises water works or plants. It is a power and discretion conferred upon the city for the public welfare, and possesses the attributes of sanitary and police measures and ought not to be impaired unless necessarily and irresistibly implied. It is a discretion and public trust reposed in the city for reasons too important to the beneficiaries to be encroached unless the rules of construction impel the court to do so. The public, when applied to an incorporated city, refers to its inhabitants. They are the beneficiaries, and the works and plant is expressly for their benefit. The language used in section 3 of the ordinance or contract is: " Nothing contained herein shall preclude said city of Helena * * * from the construction or maintenance of sewer or *other works* or *plants* of a public nature; " and it is now too late to object to giving full force and effect to the language used. It has often been held that authority to construct public works generally authorized the construction of water works and plants by an incorporated city, empowered it to construct and maintain water works.

In all reason the doctrine applies with greater force where the power to construct and maintain water works and plants is expressly conferred, and the question becomes one of limiting such power. More scope should therefore, if anything, be given to a reservation of such power, and a provision that the ordinance should not preclude the city from constructing and maintaining works or plants of a public nature should likewise be construed to include water works or plants. Especially is this so when the franchise is not exclusive and by express terms the grantor has absolved itself from all obligation to take water of the grantee.

We assert with unreserved confidence that the reservation of the right to construct and maintain works and plants of a public nature includes water works and plants, and absolutely repels any implication inconsistent or in conflict with it. The reason is the same where it is a question of conferring powers or reserving them, and the maxim is "*Ubi eadem ratio, ubi idem jus.*"

The reservation of the right to construct and maintain water works and plants carries with it the incident of its use and to sell it to the inhabitants who, as we have seen, are under no obligation to purchase of the company. If this principal thing is subordinated to its incident, and the right to make it available is taken away by inhibiting its use and sale, the grant or reservation of the main thing is destroyed. The maxim is: "*Accessorium non ducet sed sequitur suum principale.*"

Water works and plants are comprised in a grant of general powers to construct and maintain public works, and no reason can be assigned why it should not be included in a reservation of powers already granted. Indeed the reason

for the application of this rule is greater and stronger in the latter, when applied to matters in which the public interest is involved, and future councils are to be bound.

Rogers *vs.* Burlington, 3 Wall., 654, 662.
29 A. & E. Enc. of Law, p. 4 and authorities in note 4.
Matter of Public Works, 13 Fla., 699.

Many decisions might be cited to show that power conferred upon a city to make improvements for the public welfare includes water works and plants because of a public nature, and the reservation of the right to construct works of a public nature must necessarily therefore preserve the right then possessed—*i. e.*, the right to construct and maintain its own water works and plant. Public *works*, when applied to a city, *especially* apply to water works, and the adaptability and application of that fact is shown by the name appellee adopted for its company.

We insist that with the constitutional and statutory provisions against granting any exclusive privileges, in connection with the power conferred upon appellant to construct its own water works, with the right of eminent domain for that purpose, no rule of construction will admit any implication that will deprive it of such rights; and especially do we insist that when the ordinance itself expressly provides that no exclusive rights or privileges to furnish the city or its inhabitants is granted, and all obligation to take or pay for the water is *expressly negatived*, to hold that there is an implied obligation to take and pay for the water, which alone can defeat the right to install its own plant, would be a perversion of justice, utterly defeat the manifest intention of the

parties, and finds no support under any reasonable rule of construction.

When the proposition was made for a franchise and the city insisted upon and obtained in the ceding clauses of the ordinance provisions that the rights granted should not be exclusive, that it would in no way obligate itself to take or pay for the water to be furnished, and thereby limited it to a bare option or privilege to do so, it reserved to itself the right to install its own plant, conferred upon it by law, in too plain and unmistakable terms to be frittered away by judicial construction, could it even be deprived of such right by inference or implication. Indeed, it must be said that the implication is just the reverse of that claimed by appellant.

Recapitulation.

What is there, then, peculiar to the ordinance or contract before the court that rebuts the implication claimed by appellant, that the city has obligated itself not to construct and maintain a water plant during the entire duration of the franchise? Assuming that the obligation to furnish the water as claimed extends for twenty years, why does not the obligation of the city not to bring in and maintain works of its own not obtain under the particular provisions of the ordinance and contract during that period? The reason is that there are three *express* provisions therein contained which are inconsistent with such implied obligation. In other words, no such implied obligation can arise in the face of these provisions:

First. It is *expressly* provided that no exclusive privilege of furnishing the city or its inhabitants with water is granted. The parties, in significant language, thereby secure to the inhabitants full and complete competition by any lawful competitor.

Second. They *expressly* agree that neither the city nor its inhabitants shall take water unless they desire to do so. By this it is shown that the real, as distinguished from an implied, intention was to relieve the city of any and all legal, equitable, or moral obligation to take the water and create a bare option, showing that the parties had in mind the intention that no obligation in that respect was to be inferred.

Third. That in furtherance of these ideas and suggestions, it is also *expressly* agreed that nothing contained in this ordinance or contract shall be construed as precluding said city from constructing and maintaining any *works* or *plants* of a public nature. This must mean that it reserves the rights which have been conferred upon it in that respect, or it means nothing.

When a city reserves the right to construct and maintain *works* and *plants* of a public nature, it reserves the right to construct and maintain those works and plants of that nature which have been conferred upon it. To ascertain what they are we recur to section 4800 of the Political Code, subdivision 64, and find that water works, sewer plants, and lighting plants are the *works* and *plants* of a public nature which the city is authorized to construct and maintain. Indeed, if this were not so, our knowledge and conception of

the terms used would convey the idea thus expressed in the code. Being, therefore, in the nature of a reservation, the mind naturally recurs to the power conferred. In doing this the intention to reserve this power conferred is apparent and manifest, and no implication is fair or just that takes it away or destroys its effect. We must construe it to mean the works and plants, the power to construct and maintain which is conferred to give the reservation any effect. To destroy its effect by not so construing it is contrary to all rules of interpretation. To give appellee any standing whatever under the ordinance or contract, it must be necessarily implied that under these conditions the city has obligated itself not to construct and maintain such works or plants, which is absurd and contradictory. The unique inferences by which appellant seeks to overcome these prominent and forcible expressions in the ordinance or contract scarcely admit of serious consideration. Especially is this so when these powers to construct such works and plants are conferred upon the city as a part of its police powers and confessedly for its welfare. The same reasons for the conferment of the power pertain to its reservation. In all reason, language that would confer upon a city power to construct and maintain a water plant would operate to retain it when used in a reserving clause.

It must follow that if the power to construct and maintain works and plants of a public nature confers the power to construct and maintain water works, and no one contends that it does not, a reservation in similar language must operate to retain such power, and, if so, it is decisive of the merits of this contention. It must therefore be said that this implied reservation under the many authorities we

have cited has been crystallized in this instance into an *express* reservation, and no implications inconsistent with it can be indulged. When a reservation of this kind is inserted in an ordinance or contract, three suggestions necessarily, instantly, and directly recur to the mind: First, water works; second, sewer plant; third, lighting plant. With these in mind, then and there was the time to have objected, and it is too late now, after the contract is completed and one of the parties is seeking to avail itself of a reservation or condition made for its benefit.

When a city makes a contract with an individual or corporation it is perhaps true, as claimed, that it involves no governmental or legislative function. But when a city undertakes to construct and maintain water works for itself and inhabitants it must do so under its powers of a public nature, and it is this power that is sought to be preserved by section 3 of the ordinance or contract, and the question is, what is meant by such reservation in the connection in which it is used, in whatever capacity the city may be said to contract. If the *phrase used* was between individuals the question would simply be, are the works sought to be installed of a public nature. When construed in connection with a city putting in water works for the city and its inhabitants it undoubtedly is. If A has a right to contract with B that he will not engage in certain enterprises, but reserves the right to make and carry out contracts of a public nature, could he not contract with a city that was constructing its own water works for the city and its inhabitants? This clearly illustrates that the character in which the parties contract is of no consequence, and that the subject-matter of the contract is the material and

controlling attribute. If there were express provisions in the Joplin case in the lower court, or any of the other cases cited by appellant, first, that no exclusive privilege is granted; second, that no obligation of *any kind* to take the water is incurred; third, that the right to put in *works* or plants of a public nature by the city for it and its inhabitants is reserved, anything herein to the contrary notwithstanding, can it be said that the court would have reached the conclusion that there was an implied contract on the part of the city not to put in works to supply the city and its inhabitants with water? The appellant is asking the court to disregard its contract and make one more favorable to it, while the city is now seeking to avail itself of the express reservation, and the court is asked to prohibit it from doing so.

One of the principal reasons given by Judge Phillips in the Joplin case in reaching his conclusion is that the right, either to construct a lighting plant of its own or permit others to do so, precluded the idea that it could do both, and that by adopting the latter it had exhausted its powers. Here it is conceded that the power to do both exists, and that duplicate water works might be installed. It is entirely consistent with good judgment and reason, therefore, that the city, notwithstanding the reservation of the right to bring in works of its own, should at the same time require the company, so long as it occupies the streets, to furnish water at a certain pressure and of a certain quality for the inhabitants. Common prudence would suggest this course, so that, in case one was for any cause unavailable, reliance could be had upon the other works, besides affording to the inhabitants competition in furnishing water. Assuming, as

claimed, that the obligation or duty of appellant extends for twenty years instead of five, this is just what the city has done, and it is as equally applicable in the one case as the other. It has no reference to and in no way affects or qualifies the reservation. And so it is as to whether the obligation of the company arises out of a duty or contract, the reservation is appropriate in either event. It is not disputed that the city had the power to install another water works, but it is claimed that, in so far as the inhabitants are concerned, there is an implied obligation on its part that it will not do so. We are unable to appreciate or comprehend this distinction. The power to contract for water works or install them for the benefit of its inhabitants is not an agency or delegated authority by the inhabitants. It resides in the city on account of its police powers, is an entirety, and exercised for the welfare of its inhabitants as a part of the municipality in providing for their health, safety, and convenience. It is the exercise of the general power that is exercised in providing a system of sewerage, providing and keeping in repair streets and sidewalks and the like. The power to contract for water works for the city is a common power, from which source it supplies itself and its inhabitants, and this attempted distinction that it could grant a franchise to others, but cannot supply the water itself, is not supported by reason, and the maxim is, " Where the reason of the rule ceases, so should the rule itself," and " When the reason is the same, the rule should be the same."

But in the case in hand the rule and the reason are the same. The very identical language in the reservation that retains the right to grant a franchise to others to furnish the inhabitants secures the very same right to the city. The

language of section 3 of the ordinance or contract is: "Nothing contained herein shall preclude said City of Helena. * * * from the construction or maintenance of sewer works or works or plants of a public nature, or from letting, giving or granting any franchise rights or easements to any person or persons, or corporation or corporations whatsoever * * * ." Indeed it might be said that the reservation in favor of the city to construct and maintain any works or plants of a public nature emphatically forbids the implication that it will not put in water works for itself and its inhabitants, if such works are to be regarded as of a public nature.

Lewis on Eminent Domain, 2d edition, section 173, says: "The condemnation of property for supplying a city or town with water is so manifestly a public use, that it has seldom been questioned and never denied," and cites numerous cases in support of the text. Assuming that the same scope and meaning will be given the reserving clause as is given the statute conferring the power, and that the same rule in determining what are works and plants of a public nature, and that such works and plants comprise water works, we quote section 1 of "An act entitled An act to enable certain cities and towns to incur indebtedness" (approved September 14, 1887); it reads:

"SECTION 1. That any incorporated city or town in the Territory of Montana having an assessed valuation of twelve hundred thousand dollars or over, is hereby authorized to submit to the qualified electors of such city or town the question whether coupon bonds shall be issued on the credit of such city or town to an amount not exceeding two (2) per cent. of its assessed valuation, for the purpose of constructing

water works, public buildings, street grades, bridges, sewers, or other public improvements."

This act was afterwards amended so as to allow 4 instead of 2 per cent., on February 28, 1889; and so it will be seen that under the law water works are public works and must be so regarded under the reservation.

The city undoubtedly has control of its streets, alleys, and public grounds, the use of which is absolutely necessary in securing a water supply for the welfare of its inhabitants, and the exercise of such power is the exercise of governmental functions and duties, which ought not to be surrendered, if it could possibly be surrendered by implication. We confidently insist, however, that under the ordinance or contract in question there is not the slightest room for the implied obligation contended for by appellant. As we have seen, the power to construct and maintain water works for the city and its inhabitants is expressly conferred by statute, and the reservation is in keeping with many decisions; that it cannot be ceded away. The city is the judge of what is necessary for the welfare of its inhabitants, and the right and duty to provide for their security, health, and safety ought not be taken away by implication when any other construction is at all possible. We have endeavored to present this important branch of the case, in all of its various phases, to the best of our ability, and aid the court as much as possible in getting at the real merits of this contention in construing the ordinance and contract under the reservation contained in it, and wish to tender any apology the court may deem proper on account of its prolixity.

Again, it is claimed that the provisions of the statute for raising the funds necessary to the exercise of the power thus

conferred is in violation of article 13, section 6, of the constitution of the State.

Aside from presenting a proposition impracticable and absurd within itself in assuming that the revenue must be forthcoming before the completion of the works from which it is to be derived, the vice of the argument is apparent at a bare glance at the provision of the constitution. It simply and plainly intends to provide, and does provide, for the source of revenue for the indebtedness authorized to be incurred in the construction of the water works. The constitutional provision is quoted on page 4 of appellant's brief, to which we refer. If the "revenues derived therefrom" were devoted to a different purpose, then, and not until then, would any cause of complaint arise and the gravamen of the suit would be to prevent a misapplication of the appropriated fund.

Besides, it is claimed that some of the proceedings taken in the construction of the water works are not in accordance with the mode pointed out and required by the statute. Besides being obnoxious to the objection that under the agreed state of facts the city proposes and intends to comply with the provisions of the constitution and statutes in constructing and maintaining the water works, there is another reason that renders this claim absolutely untenable, if not frivolous. The object of this suit and the decree rendered by the United States circuit court of Montana absolutely prohibited the city from constructing a plant to supply the inhabitants thereof with water, and we know of no rule of law or principle of justice that works a forfeiture of *these rights* on account of a mistake in the pursuit of some of the methods pointed out by the statute. If the course pursued

is improper, the suit should have been leveled at the improper method adopted and would be confined to that, and an opportunity to correct it would then be afforded. No such question is proper here, and, if it was, the decree of the United States circuit court of Montana should apply only to the illegal steps taken and not have enjoined appellant from installing its plant for the purpose contemplated. As it was, the city was enjoined from bringing in a supply of water until after the expiration of the company's franchise, at the end of which term the old works may be entirely worthless and the inhabitants left for years without a water supply, and the city censurable for failing to provide for their welfare. In connection with this important branch of this case concerning the scope of the decree, it does not seem out of place to suggest that the record shows that the water works of appellant were constructed in 1890; that they have lived out to a great extent the ordinary life of such plants; that by means of riders through legislation the company has greatly hampered the rights of the city; that by the litigation shown by the record it has seriously embarrassed every move made by the city to secure a water supply of its own, and that if this city is now enjoined until after the franchise of appellee has expired it may then find that it will be again impeded by harassing litigation and the inhabitants probably left for many years without a water supply. This matter is important and serious, and we respectfully invite the consideration of the court to it.

In this connection we might add that we have been utterly unable to comprehend why the trial court enjoined the city from putting in its plant so as to be prepared to furnish water at the expiration of the franchise under any

phase of this case. Manifestly the city, in the exercise of its discretionary powers, has concluded that the works of the company are but short-lived, and anticipating the necessity, as a sanitary measure, of being prepared to furnish the inhabitants with water, together with the fact that it can be more cheaply done in connection with bringing in the water for municipal purposes, has deemed it advisable to put in its works at this time. We invite the court's attention to the bill of exceptions on this point, contained on pages 130 and 131 of the record.

How different in the case in hand. It is conceded that the city under its *powers* can, notwithstanding it has granted the franchise to appellant, nevertheless construct and maintain water works of its own, but that, on account of the *obligation* of the company to furnish water at a given pressure and of a certain quality for twenty years, there is an implied obligation that the city will not compete in the water business during that period. This cannot be so if the city has paid for its option to take water for itself and its inhabitants. If this obligation to keep up a water supply does not grow out of the franchise and privileges granted, it has no consideration whatever to support it. If based upon the theory that it is an obligation arising out of the option, there would be no consideration to support it and an utter want of mutuality, as it would depend entirely upon the wish and will of the city and its inhabitants. This is well illustrated in Cold Blast, &c., *vs.* City, &c., 114 Fed., 77, 81 (C. C. of A.). If the franchise, therefore, furnishes the consideration for the option, it cannot be said that any obligation is incurred by the city on account of it. The option follows and adheres to the appellant's obligation to furnish

the supply of water and is no part of the consideration for it. It is for the benefit of the city, and it has paid for it by the franchise. Having thus paid for the option, it is none of appellant's business how or from whence it gets its supply of water unless it obtains it from appellant. This construction alone saves the contract from being unnatural, and, aside from the express reservation of the right to bring in its own works of a public nature, repels the implication claimed by appellant.

Indeed, the revenue to be derived for the construction of water works for *both* the city and inhabitants under the constitution and laws could *only* be raised from sales to the inhabitants, and unless the city can thus raise it this police and sanitary power conferred upon the city will be invaded and destroyed. It cannot reasonably be claimed that it was contemplated the city would sell water to itself for its own use, and there is no other mode of raising this revenue. All this in connection with the reservation of the right to construct and maintain its own works of a public nature—*i. e.*, water works—emphatically show that it was not the intention of the city to surrender such rights, if it was at all possible for it to do so.

Commencing on page 10 and ending on page 16, elaborate quotations and citations are adduced in support of the familiar rule that the powers of a city are divided into two classes, namely, public and private; and that supplying a city with water is generally held to be of a private character.

The case of Illinois Trust & Savings Bank *vs.* Arkansas City, 78 Fed., 271, cited by counsel in their brief, pages 12 and 15, involved the construction of an express contract for the construction and maintenance of water works. As to

such contract, the court held the same rule applied as in the construction of contracts between individuals. As to that portion of ordinance No. 248 whereby the city was to be supplied for five years, the said rule would perhaps obtain. Moreover, in the Illinois case, that portion of the ordinance which granted an exclusive franchise was held void, leaving the only question to be determined that of liability for rental of water hydrants which had been installed under such grant.

But with reference to the remaining portion of the ordinance, whereby the *franchise* was granted to the Helena Consolidated Water Company, there is no doubt that it is a public grant, and in such instances the doubt, if any, is resolved in favor of the public and against the grantee. That this differentiation is well taken, we refer to the second case cited by counsel themselves, namely, Little Falls Elec. & W. Co. vs. Little Falls, 102 Fed., 662.

There the city entered into a thirty-year contract with the company for water to be furnished to the municipality, and also granted a franchise for the construction of a water and light plant. The court held the doctrine contended for by counsel as to the construction of the thirty-year contract, but expressly held against counsel's contention in construing the franchise in the following language, at the bottom of page 667:

"As to the showing to the effect that the City of Little Falls is taking steps to construct a plant for the supply of water and electric light, it appears that the complainant's franchises are not exclusive, and that there was not, as in the Walla Walla case, also cited, any contract on the part of the city that it would not, during the term for which the fran-

chises were granted, erect, maintain, or become interested in other like works."

The case of San Francisco Gas Co. *vs.* San Francisco, 9 Cal., 453, is authority for the proposition that a municipal corporation may become liable for gas on an implied contract.

The tendency of later decisions is to hold such power *public.*

"The power of supplying water by the city to its inhabitants is held in a recent New York case to be a power granted to the municipality for a *public use,* not private."

Fire Ins. Co. *vs.* Village of Keeseville, 148 N. Y., 46.

In that case the court said:

"When we find the power conferred has reference to public purposes and is for the public good, it is to be classed as governmental in its nature, and it appertains to the corporation in its political character. * * * There is nothing connected with the work which is not of a *governmental and public nature.* It is *in no sense a private business;* and the authority to construct the work was given it by the legislature, not at its own particular request or application, but because it was one of the political divisions of the State, and as such, was entitled to exercise it. No interest was designed to be subserved other than that of adding to the powers of a community carrying on a local government."

And in the brief of counsel for the electric light company in the Joplin case, in this court, this same proposition was urged and several of the same cases cited as in the case at bar.

The character of the function to be performed in the case

at bar is, truly speaking, *public*. The protection against and extinction of fires, the flushing of sewers, the enforcement of sanitary regulations, and the supplying of good, pure, wholesome, and abundant water to the inhabitants of a city, to the end that their health and daily sustenance should be preserved, and the avoidance of a water famine, are unquestionably *public* in character. And we submit that the better reasoning is in favor of the doctrine announced in 148 New York, 46, *supra*.

Considerable stress is laid on the fact that the title of ordinance No. 248 is "To provide the city of Helena and its inhabitants with a *permanent* water supply." It is said that the word "*permanent*" is significant with reference to the term of the agreement. We submit that the use of this word is in consonance with our construction of the provisions of section 26, as fully set forth in our original brief, to the effect that it was the *essence of the agreement* for the five-year period of supply, and also of the essence of granting the franchise as shown by the use of the words "acceptance thereof" (referring to the franchise), not *thereof* (the agreement), that the company should, at all times during such agreement and the term of the franchise, provide all the inhabitants of the city with a "full, ample, and sufficient supply of good, pure, wholesome and clear water," subject, of course, to the terms (*i. e.*, the rates prescribed) and conditions (if they *desired* to take it). What the city council evidently desired and intended to have understood beyond all question was that the predecessors of appellee and its successors should have a *real*, fixed, certain, and unvarying supply, as distinguished from a transitory, an uncertain, migratory affair so common in the western,

mountainous sections, where creeks are overflowing one season and dry the next.

To illustrate: Suppose that the source contemplated consisted of a creek of varying flowage, or of percolating waters flowing through gravel and drained into a well or reservoir, and thence pumped throughout the city. Unless said supply was such as to be "continuing in the same state or without any change that destroys its volume or quantity, remaining unaltered, durable, fixed, and lasting," it would not be a "permanent" supply.

The word "permanent" is defined in Webster's Unabridged Dictionary as follows: "*Continuing in the same state*, or without any change that destroys form or character; *remaining unaltered* or unremoved: abiding; durable; fixed; stable; lasting."

It is next contended (pages 8, 9) that in section 6 of the ordinance "such supply" relates solely to the *extent* of the supply and not to the time for which the supply should be furnished, notwithstanding the plain, clear, unmistakable, unambiguous, and unequivocal language there used, namely:

"Such supply shall be full, ample and sufficient for the present population of said city, and for the future population of said city as the same may be from time to time *during the full term* of five years; and said water shall be pure, wholesome, and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use."

What becomes of the language "for the full term of five years"? Is it meaningless?

Counsel next maintain, on page 21, that while its duty under its franchise to furnish water so long as it exercises

the license or permit to use the streets, "there is no duty devolving upon the water company, independent of contract, to continue the business of furnishing water; and unless complainant has contracted not to do so, it has the right to remove its pipes and mains from the streets and abandon the operation of its plant at any time," followed by a disjointed except (page 22 of brief) taken from Judge Buck's decision, contained in the transcript, page 100. This except should, we submit, in all fairness to the judge who wrote it, be given in connection with the balance of his opinion upon that particular feature.

This decision is an adjudication and furnishes a complete answer in itself to counsel's contention, just quoted, and found on pages 13, 14 and 15 of their brief. In fact, upon reading this decision (pages 199, 200, Record) it will be seen that counsel for the Helena Consolidated Water Company, predecessor in interest of complainant herein, urged the same argument that they now advance as to the *contractual obligation after the five years*, while counsel for the city took the ground which they now maintain. The court sustained the city's position, namely, that it was by reason of its *public duty* under the franchise and *not any contractual obligation* that the company was required to furnish water after its five-year contract had expired.

The next feature discussed by appellee's counsel is the Walla Walla case, extending from pages 22 to 25 of their brief. Counsel maintain that, even though the Walla Walla ordinance had not contained the express provision that the city would not install a plant of its own, "the decision would not have been different if this express provision had been omitted from the ordinance." Refraining from indul-

gence in prophecy, we will content ourselves in respect thereto, in the belief that, notwithstanding counsel's views to the contrary, the distinction urged in regard to the Walla Walla case is well taken and recognized by the many Federal decisions cited in our original brief and subsequent decisions by this honorable court.

Another and controlling distinction is that, while in the Walla Walla franchise there was an express agreement by the city that it would not install a plant of its own, here we have an express *reservation by the city of Helena* whereby it could not only grant a franchise to another company, but *an express reservation by the city of Helena itself of the right to construct its own plant.*

If " works of a public nature," when applied to an incorporated city, with power to condemn property to construct them, comprise water works, then this court is asked to leave out what has been inserted in the reservation, and insert " except water works," which has been left out, and that, too, in direct violation of the law for the construction of statutes which we have quoted, and which says the court shall not omit what is inserted or insert what is omitted. Why should this be done so as to change the whole meaning of the reservation to raise a presumption which the best-considered cases hold does not even exist without it?

Is any contract to be implied that the city would not put in its own plant during the term of appellant's franchise? The Skaneateles decision answers this in the following forcible language:

" *There is no implied contract in an ordinary grant of a franchise such as this, that the grantor will never do any act by*

which the value of the franchise may in the future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication."

We submit that the decision of the circuit court of appeals was correct and should be affirmed.

Respectfully submitted.

E. C. DAY,
City Attorney,
R. LEE WORD,
TOOLE AND BACH, AND
EDWARD HORSKY,
Solicitors and of Counsel for Appellee.

Supreme Court of the United States.

No. 27.—October Term, 1904.

The Helena Water Works Company, Appellant, vs. The City of Helena.	Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[November 28, 1904.]

This case was begun by a bill filed in the Circuit Court of the United States by the Helena Water Works Company, successor to the Helena Consolidated Water Company, to restrain the City of Helena from erecting, purchasing or acquiring a water works system for said city, and from acquiring water for such purpose, except it purchase the plant of the complainant company, and from incurring any indebtedness or expenditure of money for such purpose.

The rights in controversy are alleged to result from a contract made by the passage and acceptance by the company of a certain ordinance, number 248, passed and approved in January, 1890.

It is also alleged that the Helena Consolidated Water Company, predecessor of the complainant company, complied with all the terms of the ordinance, and expended large sums of money in erecting and maintaining the plant for supplying water to the inhabitants of the said City of Helena.

It is averred that the said city has adopted certain ordinances and taken certain proceedings to acquire and build a water system of its own, and that said ordinances and proceedings are in violation of the contract rights of the complainant company guaranteed, by section 11 of article 3 of the constitution of the State of Montana, and section 10 of article 1 of the Constitution of the United States, and that the proceedings of the city in this behalf will amount to taking the property of the complainant company without just compensation, in violation of section 14 of article 3 of the constitution of the State of Montana, and that its rights and property will be taken without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

It is further averred that the taxation necessary for the construction of the city plant is in excess of any that can be lawfully levied for such purpose.

The case was tried upon an agreed statement of facts. In the Circuit Court a decision was rendered in favor of the Water Works Company. Upon appeal to the Circuit Court of Appeals that court reversed the

decision of the Circuit Court, and remanded the case with instructions to dismiss the bill. (122 Fed. Rep. 1; 58 C. C. A. 381.)

The terms of the ordinance relied upon and so much of the agreed statement of facts as is necessary to a determination of the case sufficiently appear in the opinion.

Mr. Justice DAY delivered the opinion of the Court.

As the ordinance under consideration contains no express stipulation that the city shall not build a plant of its own to supply water for public and private purposes, and the grant is expressly declared not to be exclusive of the right to contract with another company, this case, unless it can be distinguished, is ruled by recent decisions of this court. (*Long Island Water Supply Company* v. *Brooklyn*, 166 U. S. 685–696; *City of Joplin* v. *Southwestern Missouri Lighting Co.*, 191 U. S. 150; *Skaneateles Water Works Co.* v. *Skaneateles*, 184 U. S. 354.) These cases hold that the grant of the franchise does not of itself raise an implied contract that the grantor will not do any act to interfere with the rights granted to the water works company, and that, in the absence of the grant of an exclusive privilege, none will be implied against the public, but must arise, if at all, from some specific contract binding upon the municipality.

As stated by appellant's counsel: "The position taken by appellants is, that by Ordinance 248 the city has precluded itself from engaging in the commercial business of furnishing water to its inhabitants. We maintain that by the contract contained in this ordinance the Helena Consolidated Water Company [predecessor of appellant,] for itself, its sucessors and assigns, expressly agreed to furnish water to all of the inhabitants of the city during the term of twenty years, and that by reason of the contractual obligation thus assumed by the company there is the implied promise or undertaking on the part of the city that it will not during such period become a competitor of appellant." A consideration of this contention requires an examination of the sections of the ordinance pertinent to a determination of the question:

"SEC. 1. There is hereby granted to the Helena Consolidated Water Company, and its successors and assigns, for the full term of twenty years from the passage hereof, the license and franchise of laying and maintaining water mains and pipes in and through all of the streets, alleys, avenues and public grounds of the City of Helena for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies or corporations within the said city desiring to purchase the same, and to said city for fire, sewerage and other purposes, in case said city desires to purchase the same, subject, however, to the provisions of this ordinance, hereinafter contained, establishing maximum rates, and generally to have and exercise all the rights, privileges and franchises necessary to the proper and successful furnishing of water to the

inhabitants of said city if required; provided, however, that nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Company, or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys, and public grounds, of said city with water mains and pipes, or the exclusive right of conveying, distributing or selling the same throughout the said city, or of furnishing the same to said city, except as hereinafter set forth.

"SEC. 3. All pipes and mains, including service pipes connected therewith, shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location in streets; and all repairs and extensions of such pipes and mains shall be done under the supervision of said street commissioner as to grade and location in streets. Nothing contained herein shall preclude said City of Helena from regrading or changing the grade of any street or streets within said city, or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting, giving or granting any franchises, rights or easements to any person or persons, corporation or corporations, whomsoever, so long as such franchises, rights and easements do not interfere with the franchises, rights and easements hereby granted. And that said Helena Consolidated Water Company must and shall look solely and exclusively to the person or persons, corporation or corporations, to whom such franchises, rights and easements have been given by said city for any and all damages the said Helena Consolidated Water Company may sustain by reason of any interference with any of its pipes, mains or hydrants, or any exposure of the same caused by such person or persons, corporation or corporations.

"SEC. 6. The said Helena Consolidated Water Company shall furnish and provide a full, ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction) and for other purposes; and such supply shall be full, ample and sufficient for the present population of said city, and for the future population of the said city, as the same may be from time to time during the full term of five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use.

"SEC. 26. It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell to them upon the terms and conditions herein provided and expressed."

By section 8 the company was required to provide twenty miles of mains within the limits of the city, and by section 10 the company was required to lay and maintain additional mains, of such sizes, at such times and upon such streets as the city council might from time to time direct. Section 17 provided that the company shall not refuse to permit connections to be made by or to sell water to persons offering to pay for the same.

Section 16 of the ordinance fixes maximum rates for water to be furnished to the inhabitants of the city. Section 21 makes appropriation for the term of five years from and after January 1, 1890, of certain sums for hydrants and the use of water for the benefit of the city. By the first section of the ordinance, the company is granted the use of the streets, alleys and avenues and public grounds of the city for the laying and maintenance of its pipes and mains for the purpose of conveying water and selling it to those "desiring" to purchase the same, and to the city for fire and other purposes in case the city "desires to purchase the same."

Certainly, there is nothing in this section that savors of a contract beyond the obligation imposed upon the company in consideration of the franchise and privileges granted to furnish water at certain maximum rates to private persons or to the city, when such persons or the municipality desire to purchase the same. When we come to consider section 6 we find an engagement whereby the obligation of the company to furnish water to the city is limited to the term of five years, and in section 21 we find an appropriation made to cover the compensation to be paid by the city for the term of five years for the use of water for public purposes. If these sections can be construed to amount to a contract between the city and the company, binding the city to take its entire supply of water from this company for five years, which would be broken by the erection or building of a plant by the city to supply itself with water, it had expired before the beginning of this suit, and the contract, if it existed after the expiration of the term named in section 6, must be found in other sections of the ordinance. The contention is that as by section 26 the water company was bound during the term of the agreement, which, it is claimed, is twenty years, to provide all the inhabitants of the city, whatever their number, with a water supply, this contract will be impaired and its benefits to the company destroyed if the city should erect an independent plant of its own. But, in our view, this section must be read with section 1, which requires the company to furnish water to such inhabitants of the city as desire to purchase the same, and there is nothing in this agreement which binds the city to take water from the company beyond the term of five years, expressly provided in section 6, and for which, upon specific terms as to prices, an appropriation was made in section 21. There is nothing in section 26 nor in section 1 undertaking to bind the inhabitants of the city to take water from the company. The city has not and, of course, could not undertake to make any contract upon the subject for the private supply of individuals in the city beyond securing a maximum rate of charge for water supplied. The engagement for their benefit requires the company during the term of the franchise to supply water at not exceeding certain maximum prices, which were fixed by the ordinance. Properly construed, we think this ordinance shows an agreement upon the part of

the company to furnish water to the inhabitants of the city at not exceeding certain maximum rates, and to the city itself, upon terms to be agreed upon, made definite, as far as the city was concerned, for the term of five years. As thus interpreted, we do not find anything in this contract that prevents the city, certainly after the expiration of five years, from constructing its own plant. It has not specifically bound itself not so to do, and, as has been frequently held in this court, nothing is to be taken against the public by implication. (*Hamilton Gas Light & Coke Co.* v. *Hamilton*, 146 U. S. 258; *Long Island Water Supply Company* v. *Brooklyn*, *supra*, and cases cited in the opinion.) Had it been intended to exclude the city from exercising the privilege of establishing its own plant, such purpose could have been expressed by apt words, as was the case in *Walla Walla City* v. *Walla Walla Company*, (172 U. S. 1.) It is doubtless true that the erection of such a plant by the city will render the property of the water company less valuable and, perhaps, unprofitable, but if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract. The right to tax within certain limits to procure a supply of water for the municipality, which shall be owned and controlled by the city, is authorized by the constitution of Montana, article 13, § 6. Paragraph 4800 of the Political Code of Montana provides for the carrying into effect of this constitutional power to tax for a system of water works to be owned and controlled by the municipality. The feature of the law requiring the purchase of existing water works instead of building an independent plant by the city was held unconstitutional by the Supreme Court of Montana in *Helena Consolidated Water Company* v. *Steele*, (20 Montana, 1.)

The privilege of building other works was, in the absence of some binding contract forbidding the exercise of the power, clearly within the city's constitutional and statutory rights. We cannot find that the city has precluded itself from exercising this right by anything shown in this case. This conclusion renders it unnecessary to decide whether the city's right to construct a plant of its own was expressly saved in section 3 of the ordinance reserving the right to construct and maintain "sewer work, or other works of a public nature."

This action is also brought by the water company as a taxpayer, and it is claimed that the city had no right to acquire a water supply and build its water works except by acquiring the plant of the company.

In the findings of fact it was expressly stipulated:

"That the City of Helena contemplates and intends to do all acts and things necessary to secure a water supply and system to be owned and controlled by the said City of Helena, and that it contemplates and intends to raise funds and revenue therefor in the manner provided by law, and to

use the same for said purpose, and to furnish and supply the City of Helena and the inhabitants thereof with water from its said plant, and that it contemplates and intends to purchase and secure a sufficient quantity of water for said purpose, and that complainant does not obtain any of its water supply from either Beaver, McClellen or Prickly Pear Creeks.

"That the Ordinances Nos. 467 and 483, mentioned in paragraph 27 of the complainant's bill of complaint, were duly passed and adopted and approved, and that unless said defendant, the City of Helena, is enjoined and restrained from acquiring a water supply, plant and system, it will proceed to acquire the same under said ordinances or such others as are necessary for said purpose, as hereinbefore stated, and will engage in furnishing the said defendant, the City of Helena, and its inhabitants, with water, suitable and proper for its use, and that to do so will depreciate the value of complainant's franchise and property, as stated in paragraph 28 of the complaint, but that no injury of which complainant can complain will result therefrom if defendant city has the rights claimed by it. . . . That the revenue for said purpose will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended, in accordance with the requirements of the constitution and provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it has no legal or equitable right to do so, on account of the facts and admission hereinbefore stated and made."

We agree with the Circuit Court of Appeals that by this stipulation the controversy was narrowed to the question of the right of the city to erect and maintain an independent plant of its own in view of the alleged contract rights of the complainant. For that purpose, if it has the right so to do, it is conceded "it contemplates to raise funds and revenues therefor in the manner provided by law," and will raise revenues within the limits of indebtedness authorized by the constitution and laws of Montana. This concession renders it unnecessary to notice the allegations of the complaint as to the right to tax for the purpose of erecting such works, or the alleged invalidity of any method of acquiring water works for the city except by purchase from the complainant.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.